TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 252

MISSOURI PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

H. A. F. AULT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED FEBRUARY 26, 1921.

(27,486)

(27,488)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 733.

MISSOURI PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

H. A. F. AULT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1920.

1 Pleas Before Hon. John C. Ross, Circuit Judge, in the Hot Springs Circuit Court.

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES, Director General of Railroads, Appellant-,

vs.

H. A. F. AULT, Appellee.

Judgment Rendered January 29th, 1919.

Appeal Granted January 31st, 1919.

Comes the defendants Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and prays an appeal from the judgment rendered herein to the Supreme Court of Arkansas.

W. R. DONHAM,
Attorney for Defendants.

Appeal granted July 7, 1919.

W. P. SADLER,
Clerk Supreme Court of Ark.,
By J. H. CAMPBELL,
D. C.

2 Before D. M. Noble, a Justice of the Peace in and for Fenter Tp., in Hot Springs Co., Ark.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD CO., Defendant.

Complaint.

Comes the plaintiff complaining of the defendant and for his cause of action states that the defendant is a corporation duly organized and existing under the laws of the State of Missouri, and engaged in the business of operating a line of railway from St. Louis, Mo., to Texarkana, Ark., and that said railroad is operated through Hot Springs Co. in said State.

That during the month of July, 1918, the plaintiff was in the employ of the defendant at Malvern, Ark. and that his duties consisted of putting baggage on the passenger trains and receiving same from the trains, and performing other work around the depot at said station that according to the terms of his employment he was re-

ceiving wages at the rate of $2.50 *dollars* per day, and that on the 23rd day of July, 1918, the defendant discharged the plaintiff and refused to longer employ him, and at the time of his discharge there was due him for services rendered said company the
3 sum of Fifty ($50.00) Dollars, and the plaintiff demanded payment of same and requested the agent at Malvern, under whom he was employed, to pay him the money due him or have a valid check therefor sent to the said agent at Malvern, within seven days, and that more than seven days after he was discharged he applied to said agent for his money due him, or a valid check therefor, and at other times thereafter tried to get the defendant to settle with him, but the defendant through its agents and servants have failed, neglected and refused to pay the plaintiff the amount due him for work performed for the defendant, or any part thereof, and that the defendant still fails, neglects and refuses to pay same; and the plaintiff hereby claims the penalty allowed him under the law, that his wages be continued at the same rate until the amount due him for work performed is paid in full.

The premises considered, the plaintiff prays that he have judgment against the defendant for the sum of Fifty ($50.00) Dollars for the amount due him at the time he was discharged, and in addition to said amount, he prays that his wages be continued from the time of his discharge, until he is paid in full.

That he have judgment for his costs herein and for all other general and proper relief.

JABEZ M. SMITH,
D. D. GLOVER,
Attorneys for Plaintiff.

Filed Aug. 10th, 1918. D. M. Noble, J. P.

4 Summons issued August 10th, 1918.
Summons served August 10th, 1918.

5 Hot Springs County, in D. M. Noble's J. P. Court, at Malvern, Arkansas.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD CO., Defendant.

Affidavit for Appeal.

I, E. B. Kinsworthy, do solemnly swear that I am one of the attorneys for the Missouri Pacific Railroad Company, defendants herein, and that the appeal taken in the above entitled cause is not taken for the purpose of delay, but that justice may be done the appellant.

E. B. KINSWORTHY.

Subscribed and sworn to before me this 14th day of Sept. 1918.
[SEAL.] GEORGE BEATTIE,
Notary Public.

6 County of Hot Springs,
Fenter Township, ss:

H. A. F. Ault

vs.

Mo. P. Ry. Co.

On the 10th day of August, 1918, the plaintiff filed before me his cause of action against defendants for $50.00, as follows, to-wit:

Due for labor performed and penalty allowed by the Statutes.

Thereupon a writ of summons was issued against the defendants returnable on the 21st day of August, 1918, at 10 o'clock A. M. and delivered to the constable, Garland Gibbs, Deputy, of Fenter Township.

On this 21st day of August, 1918, this cause coming on to be heard, comes Garland Gibbs, Dep. Constable, and makes his return showing that the summons had been duly served more than 10 days on the agent of defendant at Malvern, Ark., and on the same day comes the plaintiff in person and by his attorney Jabez M. Smith, and the defendant not appearing is three times called but fails to answer and the Court after waiting three hours for the defendant to appear, he fails to answer or otherwise plead, and the defendant still failing to do so is declared to be in default herein.

7 Whereupon the Court proceeded to try said case, and after hearing the evidence of the plaintiff, finds, that the defendant is indebted to the plaintiff in the sum of $50.00 for labor performed by plaintiff for the defendant and that the plaintiff was discharged by the defendant from its employ on the 29th day of July, 1918, and that plaintiff made the proper demands for the wages due him and also demanded same more than 7 days after he was discharged, and the defendant failed, *re*fused and refused to pay him and that under the law, the plaintiff is entitled to have his wages continued at the rate of $2.50 per day from the 29th day of July, 1918, until the same is paid in full.

It is therefore considered, ordered and adjudged by the Court that the plaintiff have and recover of and from the defendant the Mo. P. R. R. Co., the sum of Fifty Dollars and that in addition to said amount, the plaintiff have and recover of the said defendant as a penalty for the nonpayment of said wages, the sum of $2.50 per day from the 29th day of July, until the said Fifty Dollars, wages, are paid in full and that the plaintiff also have judgment for all of his costs herein expended.

Given under my hand this 21 day of August, 1918.

D. M. NOBLE, *J. P.*

I do hereby certify that this is a true and perfect transcript from my docket and all of the papers pertaining to said case.

D. M. NOBLE, *J. P.*

Transcript Filed Sept. 16th, 1918.

R. R. CHAMBERLAIN,
Clerk.

8 In the Hot Springs Circuit Court.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Comes defendant, Missouri Pacific Railroad Company, and for its answer to the complaint of plaintiff, states:

That defendant denies that during the month of July, 1918, plaintiff was in its employ at Malvern, Arkansas, and that his duties consisted of putting baggage on passenger trains and receiving same from the trains and performing other work around the depot at said station; and further denies that according to the terms of his alleged contract of employment that he was to receive wages at the rate of $2.50 per day.

Defendant denies that on the 23rd day of July, 1918, or at any other time, that it discharged plaintiff or refused to longer employ him.

It denies that at the date of said alleged discharge it was due him the sum of Fifty Dollars, or any other amount, for which plaintiff demanded payment or that he requested the agent at Malvern, under whom he alleges he was employed, to pay him the money due him or have a valid check therefor sent to said agent within seven days, or that more than seven days after his alleged discharge he applied to the agent for the money due him;
9 or a valid check therefor, or that he so applied at other times thereafter.

It denies that its agents or servants have failed or neglected or refused to pay the plaintiff any amount due him for work performed for it, or that it has failed, neglected or refused to pay him part of any sum due him for such work.

It denies that plaintiff is entitled to any penalty whatever.

Wherefore, having answered, defendant prays that plaintiff take nothing by reason of his complaint, that same be dismissed, that it have judgment for all its costs in this cause expended and for all other general and proper relief.

W. R. DONHAM,
Attorney for Defendant.

Filed January 20th, 1919. R. R. Chamberlain, Clerk.

10 In the Hot Spring Circuit Court, January 20th, 1919.

No. 1494.

H. A. F. Ault, Plaintiff,

vs.

Mo. Pac. R. R. Co., Defendant.

(Answer of Defendant Filed.)

In the Hot Spring Circuit Court, January 29th, 1919.

No. 1494.

H. A. F. Ault, Plaintiff,

vs.

Mo. Pac. R. R. Co., Defendant.

(Wage Debt.)

This day comes the plaintiff in person and by D. D. Glover and Jabez M. Smith, Esqrs., his attorneys, and comes also the defendant by W. R. Donham, Esqr., its attorney, and defendant moves the Court to make Walker D. Hines, Director General of Railroads, a party defendant, and to dismiss as to the Mo. Pac. R. R. Co.

After hearing the agreement of counsel on both sides, and the Court being well and sufficiently advised as to all matters of law and fact arising herein, doth grant said motion in so far as the
11 making of Walker D. Hines, Director General of Railroads a party defendant herein, but overrules said motion as to the dismissal of the defendants Mo. Pac. R. R. Co., to which ruling defendants excepts and save their exceptions.

Whereupon said defendants offer to confess judgment in the sum of $31.20, but which offer is by the plaintiff declined.

And whereupon both parties announce ready for trial, and comes J. S. Tucker, and eleven (11) other members of the regular pannel of petit jurors, who are duly sworn and examined as to their qualifications, found competent and selected by both parties as a trial jury in this case.

After hearing the evidence adduced, defendant requested peremptory instructions as to penalty, which was refused, and the instructions of the Court and the argument of Counsel on both sides, the jury retired to consider of their verdict, and afterwards on this day returned into open Court with the following verdict, to-wit:

"We, the jury, find for the plaintiff in the sum of $50.00 as debt for labor; also $2.50 per day as penalty from the 28th day of July, 1918, until the present date.

J. M. CALDWELL,
Foreman."

It is therefore considered, ordered and adjudged by the Court that the plaintiff, H. A. F. Ault, do have and recover of and from the defendants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, or either of them, the sum of Fifty ($50.00) Dollars as his debt for labor performed, together with the sum of Three Hundred Ninety ($390.00) Dollars as penalty, and all costs accrued herein for which execution may issue.

12 In the Hot Springs Circuit Court.

H. A. F. AULT, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY et al., Defendants.

Motion for New Trial.

Come the defendants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and move the Court to set aside the verdict returned herein and the judgment rendered thereon and grant unto them a new trial of this cause, and for grounds of said motion, state:

(1). That the verdict of the jury is contrary to the law.

(2). That the verdict of the jury is contrary to the evidence.

(3). That the verdict of the jury is contrary to the law and the evidence.

(4). That the verdict of the jury is excessive.

(5). That the verdict of the jury as to the penalty is unsupported by the evidence.

(6). That the court erred in overruling defendants' objection made to the manner in which plaintiff's counsel on direct examination suggested the answers desired from the witness H. A. F. Ault, relative to the plaintiff being discharged and refused further em-
13 ployment by the agents and servants of defendants, and further erred in then permitting the witness to go ahead and testify relative to the alleged facts which had been repeatedly suggested to said witness by his counsel.

(7) That the Court erred, over the objections of defendant, in permitting to be introduced in evidence by plaintiff, the purported written demand for payment of wages signed by H. A. F. Ault, the

plaintiff, and erred in permitting the same to be read to and considered by the jury.

(8). That the Court erred, over defendants' objection, in granting and reading to the jury plaintiff's requested written instruction #1.

(9). That the Court erred in reading plaintiff's requested written instruction #1 a second time to the jury.

(10). That the Court erred in refusing to grant and give defendants' requested written instruction #1.

(11). That the Court erred in refusing to grant and give defendants' requested written instruction marked "A."

(12). That the Court erred in refusing to grant and give a peremptory instruction for defendants.

(13). That the Court erred in overruling the motion of defendants to dismiss this cause as to the Missouri Pacific Railroad Company.

(14). That the Court erred in overruling defendants' motion for a peremptory instruction as to the penalty.

Wherefore, defendants pray that the Court set aside the verdict of the jury returned herein and the judgment of the Court rendered thereon, and that they be granted a new trial of this cause,
14 and for all other and proper relief.

W. R. DONHAM,
Attorney for Defendants.

Filed Jan. 31st, 1919. R. R. Chamberlain, Clerk.

15 In the Hot Springs Circuit Court, January 31st, 1919.

No. 1494.

H. A. F. AULT, Plaintiff,

vs.

MO. PAC. R. R. CO., and WALKER D. HINES, Director General of Railroads, Defendants.

(Motion for New Trial Filed.)

This day comes the defendants by W. R. Donham, Esqr., their attorney, and presents to the Court their motion for a new trial this day filed herein.

The Court being well and sufficiently advised as to all matters of law and fact arising herein, doth overrule said motion for a new trial, and to which action of the Court in overruling said motion for a new trial, the defendants at the time excepted and had their exceptions noted of record.

Whereupon defendants prayed an appeal to the Supreme Court of Arkansas, which was granted, and defendants asked and are

given 60 days from and after this date within which to prepare tender and file their Bill of Exceptions herein.

16 In the Hot Springs Circuit Court.

H. A. F. Ault, Plaintiff,

vs.

Missouri Pacific Railroad Company et al., Defendants.

Bill of Exceptions.

Be it remembered, That on the 29th day of January, 1919, this cause came on to be heard before the Honorable John Ross, Judge, presiding, of the Hot Springs County Circuit Court, and both parties announcing ready for trial, a jury was duly empaneled to try the issues of fact arising herein, whereupon the following evidence was introduced, objections saved, exceptions and proceedings had, to wit:

Appearances:
J. M. Smith and D. D. Glover, Esquires, for Plaintiff.
W. R. Donham, Esquire, for Defendants.
Shepherd, Reporter.

17 The Plaintiff, to sustain the issues upon his behalf, thereupon introduced the following testimony, to wit:

H. A. F. Ault, being first duly sworn, testified as follows:

Direct examination.

(Mr. Glover:)

Q. Please state your name to the jury?
A. H. A. F. Ault.
Q. You are the plaintiff in this suit, are you, Mr. Ault?
A. Yes, sir.
Q. You allege in your complaint that in July, I believe it was, in 1918, that you were in the employ of the Missouri Pacific Railroad Company?
A. Yes, sir.
Q. Is that true?
A. Yes, sir; that is true.
Q. Who employed you?
A. W. W. Jones.
Q. How long did you work there?
A. Twenty-one days.
Q. Mr. Ault, Mr. Jones, I believe, was the agent of the defendant here at that time?
A. Yes, sir.
Q. Was it his custom and did he employ all the men, all the men were employed by him and discharged by him?
A. I am told that is true, yes, sir.

18 Q. By the agent.
A. Yes, sir.
Q. I will ask you to speak a little louder?
A. W. W. Jones told me that he employed the men and I went to work under his contract.
Q. You made a contract with Mr. W. W. Jones, the agent of the Missouri Pacific Railroad Company, at that time here at Malvern?
A. Yes, sir.
Q. What did Mr. Jones, under his contract for the Missouri Pacific Railroad Company, what did he agree to pay you per day or per hour for your work?
A. Twenty-five cents an hour or 10 hours, $2.50.
Q. Under that contract how long did you work?
A. Twenty-one days.
Q. And how many hours per day?
A. It would average from eight to eleven hours a day.
Q. From eight to eleven hours a day?
A. Yes, sir.
Q. What did your time at your contract price amount to at the time you were discharged or refused further employment?
A. Fifty dollars.
Q. Fifty dollars, that is the amount you have sued for?
A. Yes, sir.
Q. Now was Mr. Jones the agent there at the time that you were discharged?

19 A. The papers were addressed to him, that was, as being the agent.
Q. Well, was he there as being the agent, or was some one else there?
A. He was there as agent.
Q. I mean at the time you were discharged was he there all the time?
A. He was only there one week, the best I recollect.
Q. Who was acting as agent?
A. Mr. E. B. Williams.
Q. Is he now the agent there and had he acted there since as agent for the Missouri Pacific Railroad Company?
A. Yes, sir.
Q. If he discharged you just tell the jury when it was that he discharged you?

Mr. Donham: Just a moment. We object to that line of questioning.
By the Court: The objection is that it is leading.

Q. Were you discharged or refused further employment under that contract?
A. I presumed so, he put a man to work in my place anyway.
Q. Well, did he tell you that he was refusing you further employment?
A. Yes, sir. I had a man to work on Sundays for me.

Mr. Donham: I object. He ought not to ask him, "did he tell you so and so."

Court: I will overrule your objection.

Mr. Donham: Save our exceptions.

Q. Then state whether or not you were discharged or refused further employment at the rate of twenty-five cents an hour by Mr. E. B. Williams. State it to the jury.

A. I was at work, as I told you before—he says as a porter, but I was working as baggage agent, as I understood it, and carrying the mail, and Mr. Williams, I went down to investigate the matter and he was the head agent and he had changed it until I was to work part of the night and part of the day. Mr. Reynolds was there and he told me that Mr. Williams was working me at $1.50 a day, and I could not support my family on that and I went down for an investigation on Saturday afternoon and Mr. Williams gets the record and he goes to "porter" and he says, "You are the porter," and I said that I don't understand that I am employed as porter, but he said, "We are paying the porter $45.00 per month." I asked Mr. Williams how I might gather the information in regard to my employment; that I was not employed as a porter under no consideration, I was employed at twenty-five cents an hour, so Mr. Williams just said that he was sorry it occurred, but he could not mend it. I just said to him—at first I said, "Mr. Williams," I said, "I cannot support my family at that figure, I turned down a job at $2.50 a day for this, and therefore I am expecting it just according to the contract." Well, he said, "I cannot do that." I said, "That is up to you." He said, "I am working according to orders, and whenever I get other orders, all right, but the money is on hand for you and if you want it, all right, and if you don't all right." I said, "Why then you can have the job." So, Sunday, I had a man employed to do the work on Sunday. I don't work any time on Sunday, and paid a man out of my own pocket to do the work on Sunday, and on Sunday I had the man paid, as I have just stated. He sent a man, sent him up Saturday evening and I refused for him to go to work until I called Mr. Harris, because he is the oldest man under W. W. Jones, as I understand it, and I asked him for information, Williams was going to stop a man from work. I told him it was my job, the way I understood it, and until I was paid for it I would not let him go to work until I got the money. He said, "You can not do that, Mr. Williams is here doing business for the Railroad Company," and he said, "I would advise you not to do it." I said, "I am ready to go back to work, I haven't refused to work at any time, but the money is what I am looking for, and if he expects to consider this as a discharge, all right." He advised with me not to refuse to let the man go to work, and, of course I taken his advice, and I then demanded of Mr. Williams my money, and he said it would be here in several days, and I was in bed sick, not able to go to the office, and my father was here, and I authorized him to go and sign anything legal pertaining to my money, didn't say anything about no definite sum, just ask them for my wages as a support to my family. My father went and he refused to

let him have the money. He claimed that the first week's check was made in Adams name. Whether he was keeping the books or the other fellow, I will not state, but, nevertheless, he said, "If you want that check I will turn it over to you," and my father came back and told me about it. I telephoned then to Mr. Williams. I told him I wanted my money, and Mr. Williams has never made any offer whatever to pay me my money. I sent my wife with a written order and he refused to pay it. I went to his office and he just turned and showed me the check, and he said, "Mr. Reynolds is gone." And I said, "If you will hand me the check and endorse it as the agent of the Railroad Company, as the freight agent here, I will get it cashed at the bank or should I fail to then it is my loss.

Q. Mr. Williams, the agent of the Missouri Pacific Railroad Company, sent a man to take your place, and did he take your place?

A. Yes, he did. Yes, sir, indeed.

Q. And he refused to continue you at the rate of $2.50 a day?

A. Yes, sir.

Q. And that is the contract you had with Mr. Jones, the agent before him?

A. Yes, sir.

Q. Have they ever paid you a cent, Mr. Ault, on your wages?

A. Not a penny. Never offered to pay.

23 Q. You made your demand of them to have your money there did you?

A. Yes, sir.

Q. How many days after you made your demand for your money to be sent to the agent here at Malvern, how many days before you called, if you called for your money or check, or did you send your father the first time?

Q. How is that?

Q. How many days was it after you say you were discharged or refused further employment at the contract you had with it, after you had made demand for your check to be here, how long was it before you sent your father down there to get your check?

A. I was discharged, the way I considered it, on Sunday, that the other fellow was there, but I sent my father over on the following Saturday.

Q. On the coming Saturday. You went yourself in person after that and demanded it.

A. Yes, sir.

Q. They never did give you any money then, did they?

A. No, sir.

Q. Nor offered you any check?

A. Yes, sir.

Q. Did they refuse to pay you the money?

A. Yes, sir.

Q. Then I believe you stated you sent your wife with an order for it?

24 A. Yes, sir.

Q. And they refused to pay her?

A. Yes, sir.

Q. Then you said—I don't know whether you stated it or not, but did you give to me and Mr. Smith as your counsel at that time an order for your money?

A. For Fifty dollars.

Q. Did you know of your own personal knowledge whether that was presented or not?

A. No, sir.

Q. You said at the time you were refused further employment that they owed you Fifty dollars?

A. Yes, sir.

Q. You had kept your time; you have got your time?

A. Yes, sir.

Q. It was twenty-five cents an hour, and it figures even Fifty dollars?

A. Yes, sir.

Cross-examination.

(Mr. Donham:)

Q. When did you begin work, Mr. Ault?

A. The 8th day of July.

Q. 1918?

A. Yes, sir.

Q. When did you cease work?

A. Twenty-one days following.

Q. What day of the month would that be?

A. I have it on the calendar. I judge it to be the 29th.

Q. The 29th day of July?

A. I would think so.

Q. Do you know what day of the week that was, the 29th day of July?

A. I do not. I could tell, though.

Q. What day of the week did you cease to work?

A. I believe I can tell you in a moment.

Q. Well, all right, tell me.

A. The day that I considered I was discharged was the 28th, on Sunday. The 29th was when I would have gone back to work if he would have let me.

Q. So you ceased your work then not on the 29th but on the 28th, which was Sunday?

A. Yes, sir.

Q. The duties of the position required you to work on Sunday, did they not?

A. I was told so when I began.

Q. You understood that when you took the employment?

A. Yes, sir; and I made arrangements with a man to do the Sunday's work.

Q. You never did do any Sunday work yourself?

A. Not a bit.

Q. You refused to do that?

A. Yes, sir.

Q. You did that because you are a minister and felt like you ought not to work on Sunday?

A. Certainly.

26 Q. How many Sundays were in there? I presume we could count that up. Do you remember how many Sundays were in there during that period?

A. We can get a calendar and see how many.

Q. All right. We can get a calendar and see. You say you began on the 8th?

A. On the 8th. The last Sunday included was three, the 14th, 21st and 28th.

Q. So that on all of those three days you refused to perform any labor yourself?

A. I just paid for the work, yes, sir.

Q. In other words, you claim the right to substitute somebody in your place, and send somebody else?

A. Yes, sir; he said that was all right.

Q. Well, whether he said that was all right or not that is what you did?

A. Sure.

Q. With whom did you have your contract of employment?

A. W. W. Jones.

Q. Was there anybody present except you and Mr. Jones?

A. My wife was present, is all.

Q. Where was the contract made?

A. At my home up the other side of the Methodist Church here, the first house the other side of the Methodist Church.

Q. You met him there, did you?

A. No, sir. He took dinner with me on the Sunday be-

27 fore. I was to work on Monday.

Q. Just please state again the terms of that contract?

A. Mr. W. W. Jones told me that if I would go to work for him, that he was needing a hand and he would give me a job at twenty-five cents an hour, or $2.50 for ten hours, and I was intending to go to work at that time for a man at Moline, which afterwards I was employed by him.

Q. Well I don't care anything about the Moline job.

A. I accepted his contract and I went to work for W. W. Jones.

Q. Did you have a pay day in there, or not?

A. No, sir.

Q. While you were working for him?

A. No, sir.

Q. Now then the day before you say your man was laid off, did you not, in the presence of E. C. Reynolds, the cashier at the freight house, make the statement that you could not work any more because the duties required your working on Sunday and you could not do it?

A. I did not.

Q. Did you know a man there by the name of Mr. Young, who was working as clerk in the freight office?

A. Mr. Young? I know Miss Young.

Q. Well, Miss Peggy Young?

A. That is the lady that sits across the table, yes, sir.

Q. Now, did you not, in the presence of Miss Peggy Young,
28 the young lady that has just gone out of here, as well as in the presence of Mr. E. C. Reynolds, and also in the presence of E. B. Williams, who was the agent you say, make the statement that you did not care to work any longer because your duties required you to work Sundays, and on account of being a Methodist preacher, or a preacher, that you refused to do it?

A. No, sir, I did not make that statement at all.

Q. Do you know Mr. W. D. Harris?

A. I don't know his initials. I know Mr. Harris.

Q. Who was working there at the freight office?

A. Yes, sir.

Q. Did not you state to him or in his presence that you could not work because of your job requiring you to work on Sundays and you would not do it?

A. No, sir.

Q. That is all.

Redirect examination.

(Mr. Glover:)

Q. I believe you stated that when you entered the contract with Jones it was understood you would not work on Sundays but that you would furnish a man?

A. That was the understanding with Mr. Williams and myself and Mr. Hanley, I had made that arrangement.

Q. To furnish a man to take your place, to take your place on the Sabbath day when you would not work and you paid for that man out of your own pocket?

29 A. Yes, sir.

Q. The railroad company did not pay him to work, did it?

A. No, sir; not a penny.

Q. He was accepted by them to work on that day?

A. Yes, sir.

Q. They have never paid you that back, have they?

A. No, sir; not a penny.

Q. That is all.

Recross-examination.

(Mr. Donham:)

Q. There is a further question, Mr. Ault. When you were sending down there demanding your pay, what amount were you demanding?

A. I never made any definite amount, with the exception of the attorneys, when they made a definite demand for the money. I just sent for my money, that was all.

Q. What amount was that?

A. Fifty dollars.

Q. That is what you were demanding or wanted?
A. Yes, sir; that is the contract.
Q. Then that was the amount that you were sending there for and they offered to pay you $31.20, didn't they?
A. Never did offer to pay me a nickel.
Q. They offered to pay your attorneys, didn't they?
A. Some two or three weeks later they may have.
Q. I am not asking you about the time. As a matter of fact, that offer was made, or do you know about it?
30 A. I didn't know of it for some two or three months.
Q. You didn't know of that offer that was made to your attorneys for some two or three months?
A. No, sir.
Q. That is all.

Witness excused.
Noon recess.

31 Afternoon Session, 1.30 p. m.

H. A. F. AULT, being recalled for further direct examination, testified as follows:

Direct examination.

(Mr. Glover:)

Q. You stated in your testimony before noon something about having sent your wife down there to make some date with Mr. Williams, I wish you would restate that and see if I get it clearly in my mind?
A. I sent my wife down Saturday morning, the same morning, Saturday, as I mentioned before to collect my wages with the written order. I beg your pardon, I didn't send her with a written order but I gave her authority to get my money. Mr. Williams said he could not accept that kind of a condition but he would bring Mr. Reynolds and come out at 2:30 that afternoon of the same day and would settle that with me and then I could sign up a certain thing that he had to sign up. He did not come and she called him and he said he could not come then and my father went later.
Q. At the time you spoke about you and your wife going to his office there at night, when was that?
A. That was two weeks following the time that my father had appeared at the office.
Q. Did you and your wife see him there at his office that night?
32 A. Yes, sir; according to his orders.
Q. What did he say to you there about it?
A. He said Mr. Reynolds was gone and he had made arrangements with Mr. Reynolds to go home at five and he came back at six, and we agreed we would not be at his office later than 6:15.
Q. How long was that after he told you he could not use you?
A. Three weeks.

Q. What evening was it he told you he could not use you any further?

A. On Saturday evening, the 28th, I believe is the way I stated it.

Q. Just state to the jury what his exact words were with reference to not using you any further?

A. When he examined the record first he claimed the record said that they only paid a porter $45.00 per month and that is all he could give and he could not use me at that figure, was all he said. Of course, I told him when he paid me I was willing to let the other man take charge of the job and not before, so he sent a man that same afternoon to take my place and I refused to let him go to work on Sunday and I not being there the other fellow gave away and let him go to work.

Q. He told you he could not use you any further at $2.50 a day?

33 A. $2.50 a day, yes, sir.

Cross-examination.

(Mr. Donham:)

Q. Do you recall the conversation that Mr. Harris had on the next day, Sunday?

A. Yes, sir.

Q. Did not you call Mr. Harris up and tell him that you had reconsidered the matter and that you believed you would go back to work?

A. No, sir. I just called Mr. Harris and asked him for information, him being the oldest man in the house. I told him I was a man that wanted to do the right and square thing and my father had learned that he was going to put a man on any way, I didn't know that myself because I was at home and had been to church, and the next day he had a man paid to be there and my father found it out, that he was going to put a man on anyway; and he made this report to me and I told him I would not let the man go to work. That I was going to hold the job. I just thought it might be best for me to call Mr. Harris because I wanted to do it on the right kind of a business deal. I called him and asked him if Mr. Williams had telephoned and he said he did not, so I just asked him about the matter. I said, "Now he was replacing, or in other words, he sen- a man in my place and refused for me to go to work and he hasn't given

34 me any reason whatever to put him in my place except he didn't want to pay $2.50 per day. I am not willing now to go and work for him this afternoon, Mr. Harris, you are a man of age and competent to give advice and I just ask your advice on this," and he said, "I will tell you, Brother Ault, to be on the safe side of the work you had better not refuse to let him go to work." That is my best recollection about that conversation.

Q. Didn't you tell him that you had reconsidered the matter and believed you would go back to work provided arrangements could be made for somebody to take the Sunday work, that you would not do that on account of the fact that you did not believe it right to work on Sunday?

A. There never was anything said in regard to Sunday work, at all, with the exception of agreeing for the men to do the work on Sunday.
Q. Who did you have that conversation with?
A. Mr. Hanley.
Q. Who is Mr. Hanley?
A. Mr. Hanley is a man employed by the company down there.
Q. What did Mr. Hanley do?
A. He is working as the baggage man in the day time, that is, part of the time, and part of the night.
Q. In other words, he was doing the same character of work that you were doing?
35 A. Practically the same thing.
Q. You didn't have any agreement with them that had authority to make agreements with you, did you?
A. How is that?
Q. Mr. Hanley?
A. No, sir; he went to see Mr. Williams and made arrangements, and Mr. Williams, he and myself got together on the price and he did the work.
Q. You didn't see Mr. Williams, then, it was Mr. Hanley?
A. Mr. Hanley saw him for me as I understand, he was the head agent, or in other words he had been employed longer on the railroad, which had the favor.
Q. That is all.

Redirect examination.

(Mr. Glover:)

Q. When you put a man on you paid him yourself?
A. Yes, sir.
Q. The railroad company didn't do that?
A. No, sir.
Q. You made out the full time?
A. Yes, sir.

Witness excused.

36 W. W. Jones, having first been duly sworn, testified as follows:

Direct examination.

(Mr. Glover:)

Q. Your name is W. W. Jones?
A. Yes, sir.
Q. Where were you and for w-om were you working in July, 1918?
A. The Missouri Pacific Railroad Company up until July 10.
Q. Were you working here at Malvern, at that time?
A. Yes, sir.

Q. Working for the Missouri Pacific Railroad Company?
A. Yes, sir.
Q. What position did you hold with them there?
A. Railroad agent.
Q. Railroad agent?
A. Yes, sir.
Q. Did you have Mr. Ault in your employ at that time?
A. Yes, sir.
Q. What were you paying him per day, Mr. Jones, under your contract with him?
A. I agreed to pay him twenty-five cents an hour at that time, trucking freight was usually worked about ten hours in a day.
Q. That would be $2.50 a day then would it?
A. Yes, sir.
37 Q. Do you know of your own personal knowledge how much is due him down there for labor?
A. No, sir; only what time he worked for me about four days, three or four days.
Q. You were called into the war service at that time?
A. Yes, sir.
Q. So you did not stay any longer than that time?
A. No, sir.
Q. But you had him employed at twenty-five cents an hour, $2.50 a day?
A. Twenty-five cents. Of course, we had no authority to make a stated salary. We had to carry him on the extra report. We had to carry him on the extra labor roll. If he worked ten hours a day, that would be $2.50. He worked ten hours a day while I was there. If he worked eight hours, he got paid for eight hours.
Q. But that was supposed to be worked for ten hours a day?
A. We had that much work, yes, sir.
Q. And he worked that much time while you were there?
A. Yes, sir.

Cross-examination.

(Mr. Donham:)

Q. You say that three or four days after he went to work that you went away and entered the army service?
A. Yes, sir.
38 Q. Mr. Williams took your place?
A. Yes,sir.
Q. What is the salary of the baggage man?
A. At that time it was $45.00 per month.
Q. Which is $1.50 a day.
A. Yes, sir.
Q. For that extra dollar, how did you arrange that?
A. The extra dollar for what?
Q. You were to give him 25 cents a- hour?
A. I had a baggage man in addition. I had a baggage man on

the pay roll at that time when I was there. I did not hire him as a baggage man.

Q. Well, did he work as a baggage man while you were there?

A. No, sir.

Q. What did you hire him for?

A. Trucking freight.

Q. Did he not truck freight and unload baggage after that?

A. We used him in different capacities, and I carried him as a freight trucker.

Q. You carried him along as a freight trucker?

A. Yes. He might have handled some mail. We needed a man to handle some mail. The other man might have gone somewhere, and he might have handled some mail. I don't recall.

Q. Did you carry him at a salary of $2.50 on the extra roll?

39 A. Yes, sir.

Q. But the salary of baggage man was $35.00 a month?

A. Yes, sir.

Q. That is all.

Redirect examination.

(Mr. Glover:)

Q. He was handling baggage?

A. Yes, sir. We had him to do anything that was necessary.

Q. He was an extra man put on there at $2.50 a day because you had so much work one could not do it all?

A. That was his main occupation. But he was working around there and checking freight and working in the freight office.

Q. Just doing anything that you commanded him to do, wasn't it?

A. Yes, sir.

Q. That is all.

Witness excused.

40 HOMER AULT, having first been duly sworn, testified as follows:

Direct examination.

(Mr. Glover:)

Q. What is your name?

A. Homer Ault.

Q. Are you the father of the plaintiff here, Mr. Ault?

A. Yes, sir.

Q. Do you remember the occasion of him being in the services of the Missouri Pacific Railroad Company in July, 1918?

A. Yes, sir. As far as me knowing anything about the date, I don't know.

Q. But he was working there?

A. Yes, sir. I know he worked there, yes, sir.

Q. I will ask you if after the time he quit work, or was discharged there, whichever it was, when he was at home was he in bed, sick, or not?

A. Yes, sir.

Q. State whether or not during that time you visited him there at his home?

A. Yes, sir. I visited him there at his home?

Q. State whether or not at his request you went to the Missouri Pacific Railroad Company's agent here at Malvern at his request and demanded his check or money for his services there?

A. Yes, sir; I did. I did, yes, sir.

Q. Did they pay you?

41 A. No, sir; they did not.

Q. What did they say about it?

A. When I first named it to Mr. Williams I just went down there and told Mr. Williams my son was sick and I had come after his money. That is what I told him.

Q. You told him you had come after his money?

A. Yes, sir.

Q. Did you state to him how much?

A. No, sir. I never stated nothing about the amount. I just told him I had come after his pay, I believe, is the way I spoke it.

Q. What did he say to you about it?

A. Well, Mr. Williams first said there was a check, if the boy was amind to take it, made out in Adams' name.

Q. In the name of Adams?

A. Adams; yes, sir. Of course I was standing there waiting to see what he was going to do. I just called for the money and was waiting his notion on it, but he didn't give me no check and he didn't offer me any.

Q. But you went down there and demanded it?

A. After he didn't offer no check, I just says to Mr. Williams this: "Well, the boy is sick, and stands in need of his money, and I would like to get it, I understood that if I would come I could get it." I made myself acquainted with Mr. Williams and informed him that I was his father, the boy's father, and that I had come after the money.

42 Q. You told him you were the father of the boy that was sick and wanted the money?

A. Yes, sir. And I wanted his money for him. And I told Mr. Williams, I said, "Now the boy stands in need of the money." And Mr. Williams says, "I will do this;" you all understand this now, "I will do this, if he is not up by Monday," that was Saturday at dinner, the 3rd day of August, Saturday afternoon, Mr. Williams said, "if he is not up by Monday by noon, I will take Mr. Reynolds," anyhow the cashier, I think that is his name, "and the books and go up there Monday at noon and settle up with him." That is all I know about the case.

Q. That is all you know about the case?

A. Yes, sir.

No cross-examination.

Witness excused.

Plaintiff rests.

43 The Defendant, to sustain the issues upon its behalf, thereupon introduced the following testimony, to wit:

E. B. WILLIAMS, being first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is E. B. Williams?
A. Yes, sir.
Q. What is your occupation?
A. I serve as agent of the Missouri Pacific and Rock Island.
Q. How long have you been working in that capacity?
A. Since July last year.
Q. Who did you succeed as agent?
A. Mr. W. W. Jones.
Q. The young gentleman with soldier clothes on, who has just testified?
A. Yes, sir.
Q. When you took your position as agent here at Malvern, was the plaintiff, Mr. H. A. F. Ault, working there?
A. Yes, sir.
Q. What work did he do during the time that you were there and before he ceased work?
A. Well, he filled the position as late afternoon baggage man while he worked for me.
Q. As baggage man?
44 A. Yes, sir; and porter.
Q. Baggage man and porter?
A. Yes, sir.
Q. What is the salary of that position?
A. $45.00, was at that time.
Q. $45.00 per month?
A. Yes, sir; $45.00 per month.
Q. How did Mr. Ault happen to cease his employment?
A. Well, on or about the 27th, or on Saturday about the last Saturday in July, he came to *be* in the afternoon sometime and told me that he could not work any longer on account of having to work on Sunday. He said in his position it would not do for him to work on Sunday, and he said he would give me until Monday to get another man in his place. Of course, I told him that the position would bear a man on Sunday if that is the way he wanted to put it, I could get a man, as well as I recollect, and I employed a man the following day to take his place.

Q. You never then, at any time, discharged him?
A. No, sir.

Mr. Glover: We object to him leading the witness.
Mr. Donham: That isn't leading.

Q. Well did you, or did you not, discharge Mr. Ault?
A. No, sir.
45 Q. You just stated how he ceased his employment?
A. Yes, sir.

Q. Did he ever have any arrangement with you, Mr. Williams, by which he was permitted to substitute a man for the Sunday work?

A. Not without he could make it with his other baggage man up there. I expect, and I am told, that at times when he would want to get off on Sunday, he could switch off with the other man, and it was all right with me, but I never made any arrangement where he could be off all day Sunday.

Q. How many baggage men were working there?
A. Two.

Q. And you say that unless he made arrangements with the other baggage man to take his place that there was no such arrangement between you?
A. No, sir.

Q. Do you recall that Mr. Ault ever spoke to you about substituting a man or not?
A. No, sir; I do not.

Q. If he substituted some outside man that was not employed by the company there at all, did he do that of his own accord, or did he do it with your permission?

A. He did not do it with my permission, because I generally had to know who was to carry the mail and be responsible for it.
46 Q. Would you have permitted some stranger that you did not know about, that was selected by one of your employees, say a baggage man, in his position, to come into there and handle the bills and do the baggage work?

A. No, sir. The only arrangement I could have permitted him to have made would be with the day baggage man, that is, for him to do his work, so they could switch up when either one of them wanted to be off.

Q. In other words, as between the two it was immaterial to you which worked at it and which worked at day and which worked at night?

A. Yes, sir; it didn't make any difference.

Q. But as to the introduction of an outside men and strangers, did you or not ever have any arrangement with either of them that that might be done?

A. No, sir; I did not. I have always told the two baggage men, and they have always asked of me when they would want off on Sunday, and they would substitute for the other man in their place. In other words, I always allowed that. But I never did have any arrangement that I know of where they could employ an outsider.

Q. Well, would you have permitted such an arrangement as that; to employ an outsider that might be selected by either one of them?

A. No, sir. Not by somebody else. Not without it was some one I knew was familiar with the work, at least, or knew how to handle that work.

Q. That is all.

47 Cross-examination.

(Mr. Glover:)

Q. You are the agent down there now aren't you?

A. Yes, sir.

Q. You handle the books there don't you?

A. Yes, sir.

Q. The trouble you had with this man was about the amount that you were to pay him, wasn't it?

A. Well, I did not have any trouble about the amount.

Q. Well, didn't you refuse to pay him?

A. No, sir.

Q. What did you offer to pay him?

A. I paid him what the position paid.

Q. Well, didn't you have the books before you?

A. Yes, sir.

Q. Don't you know that your books show you owed him $2.50 a day, or twenty-five cents an hour?

A. No, sir.

Q. Didn't you keep any time record?

A. Yes, sir.

Q. Who keeps the time roll?

A. I do.

Q. And you know now that he was paid, was being paid $2.50 a day?

A. No, sir.

Q. You refused to pay him $2.50 a day, didn't you?

A. Yes, sir.

48 Q. And that is the reason you let him out, wasn't it?

A. No, sir.

Q. Didn't you tell him on Saturday evening that you could not use him any further on $2.50 a day, and if he was going to make a contention for $2.50 a day you could not use him any further?

A. I don't remember anything like that.

Q. You don't remember. Do you tell this jury that you did not tell him that you would put a man in his place?

A. This man told me in the position he was occupying he could not afford to work on Sunday.

Q. He never did work there on Sunday, did he?

A. I don't know whether he did or not.

Q. Don't you know that he was a man that did not think it was right to work on the Sabbath day, and he put a man in his place and paid him that himself?

A. He told me that he could not continue to work on Sunday.

Q. You did not pay this man extra to work extra on Sunday, did you?

A. No, sir.

Q. The railroad company did not pay them?

A. No, sir.

Q. If anybody paid him at all it was Mr. Ault?

A. I guess so.

Q. You did not handle anything there except mail and things of that kind; you don't work a man in the office down there, on Sunday?

49 A. No, sir.

Q. Sunday is supposed to be a day you handle nothing but passenger traffic?

A. Yes, sir.

Q. And you did not need a man there?

A. We needed a man there to handle the baggage.

Q. What for?

A. To do the work there.

Q. That was just trunks and things like that that come in there?

A. Yes, sir.

Q. Now did not you know and don't you know that he was substituting *there* a man there, and it was perfectly satisfactory for him to be there, perfectly satisfactory with everybody, and there had never been a complaint about him having a man in his place?

A. If he substituted anyone there to handle this work, Robert Hanley did his work down there.

Q. He was working there then, wasn't he?

A. Yes, sir.

Q. Robert Hanley is in your employ?

A. Yes, sir.

Q. And if he substituted Robert Hanley, which he avers he did, that is all right?

A. Yes, sir; if he made arrangements and paid Hanley that was all right to swap work.

Q. Hanley swore he filled his place on Sunday?

50 A. Yes, sir.

Q. He just got in the extra time, that much extra time?

A. Yes, sir.

Q. That was Hanley, that was his regular business, wasn't it?

A. Yes, sir.

Q. That was perfectly all right, then, with you if he wanted to handle it?

A. If he wanted to switch?

Q. That is what he says he did do, he got Hanley to handle it for him on Sunday because he would not get anybody else and you had no complaint on that, and it would not have made any difference if Hanley had handled it that way for ten years, would it?

A. Well, now, if he was going to make a regular thing of it, I couldn't say about that.

Q. Didn't you tell the jury awhile ago that you told him if he could get the other man to take his place on Sunday why it would be perfectly all right with you?

A. What I said is this, whenever they wanted to change and when one of them wanted off on Sunday, on any special occasion, if he could get the other man to take his place why it would be all right with him.

Q. Yes, sir; and you had Mr. Hanley in your employ in that capacity, didn't you?

A. Yes, sir.

Q. And he is there now doing the same kind of work, isn't he?

51 A. Yes, sir.

Q. And he served in his place and that was perfectly all right with the railroad company?

A. Yes, sir.

Q. Tell the jury why it was that you wanted to put him out on account of the Sunday work?

A. I did not.

Q. Tell the jury why it was you wanted to let him out on account of the Sunday work?

A. I did not let him out. He told me that he was going to quit and that he would give me time to get a man in his place, because he could not work on Sundays.

Q. Didn't you refuse to let him work there any more, or any longer, at $2.50 per day, after he told you that that was his contract?

A. I don't remember anything about $2.50 a day, I don't remember that that was ever mentioned.

Q. You mean to say that you never heard anything about that?

A. No, not until something came up about his check, when he came and called for his time.

Q. What were you paying Hanley?

A. Well, I don't know, I don't know exactly what we were paying him then. I think, possibly, we were paying him about $55.00 per month.

Q. I thought you said that you could not pay but $45.00 per month.

52 A. Well, I would like to explain that.

Q. No, just answer my question. I wish to ask you this question?

A. Well, I would like to explain it. I said in speaking of the two positions there, that one paid about $55.00, the late afternoon baggage position paid $45.00.

Q. That was not what I asked you. I asked you what you were paying Hanley at that time?

A. I suppose $55.00.

Q. You suppose?

A. Yes, sir.

Q. Don't you know?

A. No, sir; not for sure.

Q. Don't you know that you were paying Hanley at that time $2.50 a day.

A. I don't know that.

Q. Don't you know that as a matter of fact?
A. Well, it might figure right close around that.
Q. How would it figure that if you wasn't paying it? What is it you are paying him now?
A. Paying him $87.50.
Q. Didn't he work for twenty-five cents an hour when he was working?
A. You mean when he worked before?
Q. I mean at the time Ault worked there, at the same time?
A. He did not work on an hourly basis.
Q. He didn't?
A. No, sir.
53 Q. You refused to pay him $50.00, didn't you?
A. Yes, sir.
Q. Do you remember my coming down there and presenting you with an order?
A. Yes, sir.
Q. I wish you would read that to the jury?
A. (Reading) "Dear Sir: Please deliver my——"
Q. Read the date of it, the whole thing?
A. "August 10th Malvern, Arkansas. Missouri Pacific Railroad Company. Mr. E. B. Williams, Agent. Dear Sir: Please deliver my check, or my money, for my labor performed, amounting to $50.00, to D. D. Glover and J. M. Smith, my attorneys, and oblige."
Q. Who is it signed by?
A. H. A. F. Ault.
Q. That is the same man that is suing here?
A. Yes, sir.
Q. He is the plaintiff in this case?
A. Yes, sir.
Q. And you refused to pay that, didn't you?
A. Yes, sir.

Mr. Glover: I want to introduce this in evidence and let it be marked exhibit "A" to his testimony.

(The same is above read into the record.)

Q. How much did you owe Mr. Ault that you spoke of?
A. I believe it was $31.20.
54 Q. That is all you owed him?
A. Yes, sir.
Q. You know now, that that is all you owed him?
A. Yes, sir; according to the position occupied and the time he worked.
Q. And that is all you tendered in the court below?
A. Yes, sir.
Q. Did you make that tender yourself?
A. Yes, sir.
Q. Your attorney was there, wasn't he?
A. Yes, sir.
Q. You never did tender him any more than that?

A. I didn't, no, sir; myself.

Q. Mr. Henry Berger was your attorney in the lower court?

A. Yes, sir.

Q. Didn't Mr. Ault make repeated demands on you for his money?

A. I remember him calling up and requesting me to bring it out.

Q. Didn't he send his wife down there and didn't she request you to pay her the money for him?

A. I don't remember about his wife. I remember about his father coming down.

Q. Don't you remember his wife came down there and told you that her husband was sick and that they needed the money and that they wanted it up there to buy food with, and didn't you

55 tell her that you could not do that kind of business?

A. Mr. Reynolds might have.

Q. I am asking you if you didn't do it?

A. I don't recall. I don't recollect about that.

Q. Will you say that you did not do it?

A. I remembere his father coming down.

Q. Don't you remember her coming down there?

A. I remember her calling up.

Q. Don't you remember her coming down there when you said you could not pay him because Mr. Reynolds was out, and didn't she say—didn't she make arrangements with you and say to you that her husband would come down there that night after supper and let you pay it, and didn't they come?

A. It might have been her instead of the father.

Q. I am not asking you about the father. I am going to do that later on. Let's get through with the husband and wife first, and then I will ask you about the father. I asked you this question: If she, the wife of Ault, the plaintiff in this case, if she did not come down there, at his request, when he was sick and not able to come himself; didn't she come down there and ask you to deliver his check to her because they needed it to buy food with, and didn't you refuse to do it?

A. I think she came and asked Mr. Reynolds. I don't

56 remember of her ever asking me.

Q. I am not asking you if she ever asked anybody else; but I am asking you if she ever asked you?

A. No, sir; I don't think she did.

Q. I will ask you if she didn't make arrangements with you to meet you at your office, the railroad company's office down there, that night after supper?

A. They made arrangements some way. I don't know whether it was with Mr. Ault or her.

Q. Well, that was her, I guess, wasn't it?

A. That he would be there about 6:15 one afternoon, Mr. Ault came along there about 6:05.

Q. Didn't his wife come there with the little baby?

A. No, sir; I don't remember it.

Q. You don't remember that?
A. No, sir; I don't remember that.
Q. He came, though, didn't he?
A. Yes, sir.
Q. He came and demanded his money about 6:05. How long was that after you put that other man in his place?
A. Some ten or fifteen days.
Q. Then he did come down there and demanded it?
A. Yes, sir.
Q. You didn't pay them there either, did you?
A. Yes, sir.
Q. You had his check there?
A. Yes, sir.
57 Q. Didn't you have another man's check that you tried to give him?
A. No, sir; I had his check there for his time.
Q. Did you offer it to him?
A. Yes, sir. I didn't offer it to him because it was in the safe and I couldn't get it. It was after closing hours and I requested that if he would wait until about 6:15 that Mr. Reynolds would be there at that time and he could open the safe and get it out for him.
Q. Don't you know that you had the combination to that safe?
A. No, sir.
Q. Do you mean to tell this jury that you are serving there as agent and that you do not know the combination of that safe?
A. That is right; yes, sir.
Q. Well, you did not pay him his money, did you?
A. No, sir.
Q. Did you send it out to him after that?
A. No, sir.
Q. You knew the man was in need of this money, didn't you? Why didn't you send it?
A. Well, he could have waited a few minutes there and received it. He said, "I am tired of fooling with it," and he went away.
Q. I will ask you if he didn't send his father down there to get it?
58 A. Yes, sir.
Q. What did you tell him?
A. I made arrangements with Mr. Ault, his father, I asked him if it would not be all right for him to go and have Mr. Ault sign up.
Q. You knew Mr. Ault was in need of the money at that time, didn't you?
A. He didn't seem to be.
Q. Didn't Mr. Ault, the father of this man that is suing here, didn't he tell you that his son was in bed sick and needed that money?
A. I don't remember.
Q. Do you say he did not say it?
A. I think he was working for a brick plant.
Q. Who was?
A. Mr. Ault. Mr. H. A. F. Ault.

Q. Do you tell the jury that this man was working when his father came down there for his money?

A. I don't know for sure; but it was my understanding that he had gone to work down there for the brick plant, and that he did not have time to come up after his check himself.

Q. Did you ever have a written order sent up there to you, brought up by his wife and signed by Mr. Ault?

A. I don't know, sir; it seems to me like Mr. Ault's father had some order, he or his wife.

Q. I will ask you if his wife didn't bring an order down there to you?

59 A. Well, now, she may have brought one.

Q. I will ask you to look at that and see if it is not a written order from him that his wife brought back down there and told you that he had authorized her to sign everything and get that check?

A. I expect that is the order that she brought for the cash.

Q. I will ask you to read that to the jury there.

A. (Reading) "Malvern, Arkansas: August 8th. Mr. E. B. Williams, Agent of the I. M. R. R. Freight Office. Dear Sir and Manager: Since it is impossible for me to appear at your office for my checks as I am otherwise employed at present. I am, therefore, requesting you to let my wife have them and sign up for me in any form that may become necessary to the safety of the company in my name. Yours respectively, submitted. (My own signature) H. A. F. Ault."

Q. Did you deliver it on that order?

A. No, sir.

Q. Why didn't you?

A. I don't remember the order myself.

Q. Haven't you seen that order down there?

A. No, sir; I don't remember it.

Q. I want to have that marked Exhibit "B" to your testimony. You remember his father coming down there, don't you?

60 A. Yes, sir.

Q. This is in August. He was let out in July, wasn't he? And this order was a written order?

A. Yes, sir.

Q. That was in the month following the time that he let him out?

A. Yes, sir.

Q. You didn't deliver it on that, did you?

A. No, sir.

Q. If you had his check there when he says in this written order that he is authorizing his wife to sign up for anything that is necessary to release the company from anything, why didn't you deliver it on that, if you had any check there?

A. I don't remember it.

Q. You don't remember it?

A. I was not the cashier.

Q. You had control of this matter, didn't you?

A. Yes, sir.

Q. Why didn't you authorize it done?
A. I might not have been in at that time.
Q. You say you don't know?
A. I don't remember.
Q. You don't remember anything about it?
A. No, sir.
Q. You don't remember anything about it?
A. No, sir.

Q. All you remember is you say that there is only $31.20
61 due.

A. Yes, sir.
Q. That is all that is due?
A. Yes, sir.
Q. That is the reason you let him out because you would not pay him $2.50 a day?
A. No, sir; that is not right.
Q. Why didn't you continue him at his work?
A. He requested me to get a man in his place by Monday.
Q. Who requested you to do that? Do you say he requested you to do that?
A. Yes, sir; and I got a man and put him to work, and then he sent me word that he had reconsidered the matter and would come back, possibly, Sunday.
Q. Well, would you have let him go to work at $2.50 a day if he had come back?
A. No, sir.
Q. Why?
A. Because the position didn't pay it.
Q. Now, we are getting down to it. You did let him out then because you wouldn't pay him $2.50 a day?
A. No, sir; that is not right.
Q. He was a good man, wasn't he?
A. Yes, sir; he did his work very well.
Q. He did his work as well as anybody else you put in his place?
A. Yes, sir; I suppose.
Q. Then you let him out because you would not give him $2.50 a day?

62 A. No, sir; I let him out because he requested me to get a man in his place.

Redirect examination.

(Mr. Donham:)

Q. Mr. Glover, in his examination of you, uses the expression, "You let him out," did you let him out or did he quit?
A. Well, he quit of his own accord.
Q. What does the position pay there now that he had?
A. Straight time for ten hours amounts to about $87.50.
Q. The Government has raised the salaries of the employees recently?
A. Yes, sir; that is what Hanley is getting now.

Q. Do you remember what Hanley's position paid then; I believe you said he received $55 per month?
A. $55 per month; yes, sir.
Q. What was the reason of the difference in the salaries of the two positions at that time, or do you remember?
A. No, sir; I do not. I think the $45 position was just a lately created position, probably hadn't been there over two years.
Q. Who fixes those salaries, do you do that or does someone else higher-up do that for you?
A. I suppose the General Superintendent's office.
Q. You have nothing to do then with the creating of the positions or the fixing of the salaries?
63 A. No, sir.
Q. You knew the salary of that position, baggage man, was $45 per month, and that is what you were paying him?
A. Yes, sir.
Q. According to that $31.20 is what you owed him?
A. Yes, sir.

Witness excused.

64 W. D. HARRIS, having been first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is Mr. Harris?
A. Yes, sir.
Q. Mr. Harris, what is your occupation?
A. Yard Clerk, Missouri Pacific Railroad Company.
Q. How long have you been holding that position?
A. A little over two years the last time. I guess about probably eight years before.
Q. Do you know the plaintiff here, Mr. H. A. F. Ault?
A. Yes, sir; I know him.
Q. You say you know him?
A. Yes, sir.
Q. I believe he was working in the position of baggage man along last July for the company here in Malvern?
A. Yes, sir.
Q. Do you remember that?
A. Yes, sir.
Q. Do you know, Mr. Harris, whether he quit the services of the company of his own accord, or whether he was discharged?
A. I heard him tell the agent that he had quit; and that he notified him to get—that he would give him two days for him to get him another man in his place. That was on Saturday and he
65 stated that he would give him until Monday to get him another man to take his place.

Q. He would give him from Saturday until Monday to get another man to take his place?

A. Yes, sir.

Q. What was his objection to the proposition, Mr. Harris?

A. I think it was a salary question.

Q. The Sabbath question?

A. The Sabbath; yes, sir; and salary, too, making two questions.

Q. Two questions?

A. Yes, sir; I don't think the salary suited him either.

Q. You don't think that the salary suited him either?

A. No, sir.

Q. And that the Sabbath question didn't suit him?

A. Yes, sir.

Q. I wish you would tell us just what he said about it as best you can remember?

A. I heard him tell the agent that he could not afford to work any longer and he would give him two days' notice to get a man in his place; that a man of his standing could not afford to work on Sunday and that the work included Sundays, too.

Q. Did he have any conversation with you after that time?

A. Nothing except over the telephone.

Q. State what he said to you over the telephone?

66 A. He called me up on Sunday and he asked me if I would see the agent and see if he could come back. He said he had reconsidered the matter and that he thought he would come back and work on at the same salary if the agent would arrange it so he would not have to work on Sundays because he could not afford to work on Sunday on account of his standing, being a minister, wouldn't permit it.

Q. But that he had decided to come back provided the agent would arrange to get somebody else in his place to work on Sundays?

A. Yes, sir. He told me that on Sunday afternoon. He called me at my home and talked to me over the telephone.

Q. That is all.

Cross-examination.

(Mr. Glover:)

Q. Mr. Harris, you are in the employ of the Railroad Company, aren't you?

A. Yes, sir.

Q. How long have you been working for the Railroad Company?

A. I don't know, something like ten or twelve years, altogether.

Q. This conversation you heard about Monday, that occurred on Saturday?

A. Saturday afternoon, I believe it was.

Q. What did that come up about there, what did the conversation come up about?

A. He claimed he was short in his check, I believe.

67 Q. What did he state that his contract was with them there with reference to his wages?

A. He said that Mr. Jones had promised him $2.50 a day.

Q. Yes, sir. Do you know of your own personal knowledge that he was working at that time for $2.50 a day?

A. No, sir; I do not.

Q. You don't know about that?

A. No, sir.

Q. You don't handle that record?

A. No, sir.

Q. Did not Mr. Williams tell him there that he could not use him any longer at $2.50 a day?

A. He told him that he could not afford to pay him $2.50 a day, that the work on that job, that the position, the salary on that job, was $45.00.

Q. And he could not use him any further at $2.50 per day?

A. He told him that the company did not allow it on that job, that was all.

Q. He told him that he could not pay him $2.50 a day and that he had a man in his place?

A. No, sir; that isn't the way he said it, but Mr. Ault told him that he would give him until Monday to get a man in his place.

Q. Well, Mr. Ault just said if you are going to pay me on my contract, according to my contract, which is $2.50 a day—wasn't he contending for that?

A. That is what he said Mr. Jones promised him.

68 Q. The agent there told him that he would not pay him that, didn't he?

A. He would not pay him any more than the salary allowed.

Q. He would not pay him any more than $45. per month?

A. Yes, sir.

Q. And that he could not use him any further at $2.50 a day. Well, did he refuse to pay him $2.50 a day up to that time?

A. I just told you all I know about it, that he couldn't afford to pay it.

Q. Don't you know that you were in there when this happened and you heard Mr. Williams say time after time that he would not pay him $2.50 a day for the time back of that?

A. I don't know anything about that.

Q. You don't know that is what the trouble is here, that that is what they are disputing about now?

A. I suppose they are.

Q. You suppose they are now. He was contending he was due $50.00?

A. Yes, sir.

Q. They contend he was due how much?

A. I never figured it. I don't know anything about that.

Q. You say that both the Sabbath and the salary questions were up there?

A. Yes, sir.

69 Q. Mr. Ault never did work there on Sunday, did he?

A. I don't know.

Q. He always put a substitute in his place, didn't he?

A. I could not tell you. I was not up there on the Sabbath.

Q. You don't know whether he worked on the Sabbath or not?

A. I don't know whether he did Sunday or not; no, sir; I didn't know who the man was for quite a while after he had been put in there.

Q. What does the baggage position, what are they paying there for the baggage man now?

A. I think his salary is $87.50.

Q. $87.50. That is the same work he wanted Mr. Ault to do for $45.00, isn't it?

A. No, sir; I don't think so.

Q. What was it he did?

A. I think the regular man he had was *the* carry the mail, clean up in the afternoon and check the freight.

Q. Mr. Williams says he was on there as a baggage man; if he said that then he is mistaken, is he?

A. I don't know how he hired him.

Q. Wasn't he an extra baggage man?

A. I don't know.

Q. You don't know about that?

A. I don't know what they—what contract they had.

Q. As an extra baggage man and freight man?

70 A. I know that he would have to truck freight up there.

Q. Didn't he truck both freight and baggage?

A. No, sir.

Q. Now, you saw him trucking baggage in there and rolling it in there and doing that class of work around there, didn't you?

A. No, sir. I didn't see him up there.

Q. Your work is way down the track from that?

A. My work is at the freight office and all over; sometimes a half mile away.

Q. How often would you be up there at the depot?

A. Probably I would be there at seven o'clock in the morning. And probably I had business back there at one o'clock and probably I was back there at six.

Q. I hand you a calendar for the year 1918. Is that a calendar for the year 1918?

A. Yes, sir; I guess it is.

Mr. Glover: I want to introduce that in order that we might figure the time. I will introduce that as exhibit "C."

(Same here follows.)

71 Redirect examination.

(Mr. Donham:)

Q. Do you know whether the Government has recently raised the salaries of its employees?

A. Yes, sir; we have had two raises since January 1, 1918.

Q. Do you recollect whether this question of salary came up at the time that Mr. Ault told Mr. Williams to get another man b

Monday, or whether it was after that when the check came and it was discovered about the difference in that and the question of salary came up?

A. I think, probably, it was the same day, I am not sure.

Q. You are not sure about that?

A. No, sir; I didn't see the check, but it seems to me like it was the same day. I think our checks came, probably, about the 28th; they generally do.

Q. About the 28th ?

A. Yes, sir.

Q. Well, you don't pretend to say that the checks were there at that time?

A. I think that they probably came that morning. I am not sure about that. They might not have been.

Q. But you say that you are sure that the question of salary came up then or that it came up later when the check came, if the check wasn't there at that time?

A. I don't remember.

Q. You do remember that there was some question of sal-
72 ary connected with it; that is, there was some difference between Mr. Williams' figures and his?

A. Yes, sir.

Q. But whether that came up when the check came or whether it came up then is the question you are not sure about?

A. No, sir; I am not sure about it.

Q. That is all.

Recross-examination.

(Mr. Glover.)

Q. But you think that the questions of the Sabbath and salary were both discussed there at the same time, on Saturday?

A. Really I don't know.

Q. Well, wasn't that your first statement, I thought that it was?

A. Well, probably so, but I wasn't paying much attention to it at that time. He was talking to Mr. Williams and I was at my desk, and I wasn't paying much attention to it.

Q. Did you handle the checks there; did you ever see a check there for Mr. Ault at all?

A. No, sir.

Q. You never did see one?

A. Not that I remember.

Q. Do you know whether, as a matter of fact, any check came there; one check came down there for a fellow by the name
73 of Adams and he was trying to get that off on him for a littler amount?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Witness excused.

74 E. C. REYNOLDS, having been first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is E. C. Reynolds?
A. Yes, sir.
Q. What is your occupation?
A. Cashier at the freight office.
Q. For the Missouri Pacific Railroad Company?
A. Yes, sir.
Q. Here at Malvern?
A. Yes, sir.
Q. How long have you held that position?
A. Since about September 20th, 1917.
Q. Do you know Mr. H. A. F. Ault, the plaintiff in this case?
A. Yes, sir.
Q. Did you ever work for the company?
A. Yes, sir.
Q. Where?
A. In Malvern here.
Q. In what position?
A. Well, he handled baggage a little, handled freight around the freight office, too.
Q. Do you know how he happened to cease his work for the company, whether he quit or whether he was discharged?
75 A. He quit.
Q. How do you know that?
A. He told Mr. Williams and I, or, told Mr. Williams before me, and I heard it. They were talking before me, that he couldn't hold the job any longer because of the Sunday work, on account of his profession, he couldn't afford to work on Sundays any longer.
Q. Well, did he work any longer?
A. No, sir.

Cross-examination.

(Mr. Glover:)

Q. You and Mr. Will Summers, a witness, have been discussing this case back there in the room, haven't you?
A. No, sir.
Q. Didn't you talk it over before dinner?
A. Well, yes, sir; before we came down here.
Q. Did'nt you talk it over right there in that room?
A. With Mr. Donham.
Q. Didn't you talk it over there between yourselves before Mr. Donham came in?
A. No, sir; nothing only what I said to Mr. Donham.

Q. You never discussed it between you and Mr. Harris or Mr. Williams that he was not discharged but he was just let out and you kept that as a secret, wasn't it, and this is the first time you ever mentioned the salary or the Sabbath question?

A. No, sir; just him and I.

Q. Did he suggest that to you? How did you come to get into the Sunday question?

A. We didn't get on to anything in there. I knew all the time.

Q. You say he was baggage man down there?

A. Well, he handled baggage part of the time, and part of the time he handled freight.

Q. He was an extra baggage man, wasn't he?

A. Well, I don't know.

Q. Wasn't that the way you carried him?

A. He carried him on the extra roll, and he did whatever we wanted him to work at.

Q. Did you have anything to do with it?

A. When-er Mr. Williams wasn't there. Mr. Jones was there for a while, he worked a few days after he was employed.

Q. Did you ever have a check down there for Mr. Ault?

A. Yes, sir.

Q. When did it come?

A. I believe it came in the night of the 6th day after he quit.

Q. Where is that check now?

A. I believe we sent it back to the superintendent just a short time ago.

Q. Did you ever tender him that check at all?

A. Yes, sir.

Q. When?

A. I didn't tender it to him.

Q. Who did you tender it to?

A. His lawyer, Mr. Smith, I believe, wasn't it?

Q. You tendered it to Mr. Smith?

A. Yes, sir.

Q. You did that, did you?

A. Yes, sir; it was in the former trial.

Q. Aren't you mistaken, didn't Mr. Williams come into court and tender $31.20, wasn't that what was done?

A. That wasn't a pay check; that was a time check, that was, that he was given to sign in person, that time check.

Q. It wasn't a pay check?

A. That wasn't.

Q. Where was that sent from?

A. From the Superintendent's office.

Q. Did you attend to that check down there?

A. There was a check for about nine dollars and something.

Q. Oh, well, he didn't——

A. And the time check was for that difference?

Q. How come it to come by two different checks?

A. Well, we have two pay-days a month. He worked part of the time in one month and part of the time in another.

Q. You haven't got them now where you could get hold of them, have you?

A. No, sir; he sent them to the Superintendent.

78 Q. Now, what did Mr. Ault tell you and Mr. Williams that his contract with Mr. Jones was, didn't he tell you that he was to have $2.50 a day, or twenty-five cents an hour?

A. No, sir; I didn't hear anything about that.

Q. You never heard of that before?

A. No, sir. I heard about it after he had come after it and I had offered him the money.

Q. Didn't you hear it down there on Saturday when Mr. Williams told him he could not use him any further, and that he could not pay him $2.50 and he would let him go.

A. No, sir.

Q. What did he tell him about the $2.50 a day?

A. He didn't tell him anything that Saturday.

Q. Well, did you ever hear Williams say anything about $2.50 a day?

A. No, sir; not that day.

Q. Well, any time since that?

A. Of course, we have discussed it since he refused to accept what we offered him. He said it should be $2.50 a day.

Q. Wasn't you down there in the office when Mr. Ault's wife came down there to get his check?

A. She came down with the order for the check and I told her——

Q. Why didn't you deliver the check to her then?

79 A. Because he had to sign this check in our presence.

Q. What check?

A. His check; this time check.

Q. What difference does it make to the railroad company where he signs it if it is made out to him?

A. Well, he had to sign for this particular time check, and then I would pay him the cash.

Q. On that particular check?

A. Part of it, part of his salary.

Q. You never did have a check there for his money?

A. For part of it.

Q. I asked you if you had a check there for the money?

A. We had two checks.

Q. Well, did you ever have any checks for his salary, both of them together, that was for his money?

A. Yes, sir; one was a pay check and one was a time check. One was a pay check for about $9.00, I don't know just exactly now, and the other was a time check for the days after this pay check was made out for.

Q. Well, the time check always comes in after a man is discharged?

A. Yes, sir.

Q. They sent that in, did they?

A. Well, he wanted his time and we sent in for it.

Q. You always send in for a time check when a man is discharged?

80 A. Sure; yes, sir.

Q. That came down there, didn't it?

A. If he quits, or we discharge him, if he doesn't want to wait until the following pay-day, we send in for a time check for him.

Q. Don't you know, as a matter of fact, if a man quits he don't get his money until the next pay-day?

A. If he doesn't want to wait we send in for a time check. It is customary for them to wait, but he—if he does not want to wait, then we send in for a time check. There is two or three different ways you can get money.

Q. You might get money lots of ways, but I will ask you if it isn't true, as a matter of fact, that when a man voluntarily quits, that he gets his check on the regular pay-day of the company, just like he would if he was to work on; but if he is discharged, don't he get a time check for the balance due him.

A. Yes, sir.

Q. And didn't you get a time check down there?

A. Yes, sir; we got a time check.

Q. You say you never did hear anything about that $2.50 a day until this was all over?

A. No, sir.

Q. You just right lately found that out?

A. It has been several weeks, months, since——

81 Q. Didn't Mr. Ault come down there to make arrangements with you to get his money?

A. No, sir.

Q. He never did speak about it?

A. He never did call for his time check at all.

Q. His wife did?

A. Yes, sir; his wife did with an order from him.

Q. Why didn't you deliver it then?

A. Because we wouldn't deliver those checks only in person.

Q. Don't you know that the reason you didn't deliver him the time check there that you held up on that saying he had had his finger mashed and you wanted him to sign a release or discharge there before you would deliver him that, isn't that true?

A. No, sir.

Q. That isn't true?

A. No, sir.

Redirect examination.

(Mr. Donham:)

Q. What is the rule when a man quits of his own accord with reference to time checks, if there is any rule?

A. The same as in any other case, if he wants his time before his pay-day comes around we always write our superintendent and ask him to send us the time for this fellow.

82 Q. Is that time check any indication as to whether he has been discharged or quit of his own accord?

A. It is not.

Q. It is no indication whatever?

A. No, sir.

Witness excused.

83 Miss PEGGY YOUNG, having been first duly sworn, testified as follows:

Direct examination.

(Mr. Donham:)

Q. Your name is Miss Peggy Young?
A. Yes, sir.
Q. What is your occupation?
A. Stenographer.
Q. Where are you employed at present?
A. At the Bank of Malvern, public stenographer in the Bank of Malvern.
Q. Did you ever work for the railroad company?
A. Yes.
Q. When?
A. From May 10th until November 1st, 1918.
Q. Here at Malvern?
A. Yes, sir.
Q. What position?
A. Stenographer and billing clerk.
Q. Were you working there at the same time that Mr. Ault, the plaintiff in this case, was working there?
A. Yes, sir.
Q. Do you know whether or not he quit the services of the company of his own accord or whether he was discharged?
A. Well, from the conversation that I heard, I should judge that he quit of his own accord.

84 Q. Well, just tell the jury what you heard?
A. He came in the front office, I was sitting by Mr. Jones, at my desk, and he said that he could not take the job any longer; that he could not keep the job any longer because it required Sunday work and he being a minister could not do that.
Q. That is all.

Cross-examination.

(Mr. Glover:)

Q. Was anything said about the price he was getting there?
A. Not that I heard.
Q. You never heard of him wanting $2.50 a day?
A. No, sir.
Q. You never heard a word about that?
A. No, sir.
Q. Did you have access there to the records, or custody of the records showing what they were paying the men?
A. No, sir.
Q. Did you know what the men were drawing there?
A. No, sir.
Q. Have you talked to anybody about this case?
A. Only the attorney.

Q. Who did you talk to?
A. I talked to Mr. Donham.
Q. This gentleman here?
A. Yes, sir.
85 Q. You refused to talk to me about it, didn't you?
A. I did not refuse.
Q. Didn't you say that you would not talk to anybody but the attorney for the railroad company?
A. No, sir; I told you, Mr. Glover, I would talk to you in his presence.
Q. You wouldn't talk to me alone?
A. No, sir.
Q. You said you wanted to talk to me in his presence?
A. I said I wanted another lawyer to be present.
Q. Didn't you say you wanted the lawyer on 'my' side to be present?
A. I didn't say the lawyer on 'My' side.
Q. Didn't you?
A. No, sir.
Q. Didn't you state here the other day in the presence of a number of people here in the court house, and didn't you tell also in the Bank of Malvern, that if I knew some of the things that had occurred down there that Mr. Ault would prevail in this case?
A. Absolutely no. No, sir.
Q. You did not?
A. No, sir; I did not.

Redirect examination.

(Mr. Donham:)

Q. You never saw me before this morning, did you?
86 A. No, sir; except once.
Q. Where?
A. I saw you in the court room here last Monday morning.
Q. A week ago?
A. Yes, sir.
Q. I mean, I was never introduced to you before today?
A. No, sir.
Q. Did you ever speak to me about this case until after you went into the witness room?
A. No, sir.
Q. You made a written report about the matter after suit was filed in the J. P. Court, a written statement about the matter?
A. Yes, sir.
Q. I believe you have stated that there was nothing whatever mentioned about salary?
A. Nothing that I heard, no, sir.
Q. The thing you did hear you have already related?
A. Yes, sir.

Recross-examination.

(Mr. Glover:)

Q. What was the written report you made?
A. Mr. Donham has it.
Q. Let's see that thing. This was made to the claim agent, was it not?
A. No, sir.
87 Q. Do you know Mr. Milestone?
A. Yes, sir.
Q. Was he down there?
A. No, sir.
Q. How come you to make this and send it in?
A. As well as I remember, we had instructions to send in a statement similar to that.
Q. Who instructed you to do that?
A. Mr. Williams told me to do it.
Q. Were you in Mr. Williams' employ?
A. Yes sir. I don't know who the statement was sent to.
Q. He witnessed it himself, didn't he?
A. No, he didn't witness that, that I know of.
Q. Isn't that his name right there?
A. Oh, yes, sir, right there.
Q. That is your statement?
A. Yes, sir.
Q. I will ask you if you didn't tell him in this statement that he is complaining about the salary there and that he could not live on the salary of $45 a month?
A. I don't know; I have forgotten.
Q. If you said anything about $45 you don't know it?
A. No, sir; if I have I have forgotten it.
Q. You wouldn't have known anything about $45 if he
88 hadn't said so, would you? You said he never said anything about his salary, he never complained in any way about his salary, and that the only thing that he said there was about the Sunday work, is that what you said?
A. Yes, sir.
Q. And that is what you wrote in?
A. To the best of my knowledge I don't recollect.
Q. I wish you would read that over and see if you didn't say in there that you said something about $45 also?

—. ——.

Q. What about it?
A. Why, it is there, I don't deny that. I said I didn't know that I wrote it, because I didn't remember it.
Q. Now, you say you did?
A. I said that I couldn't remember.
Q. Why did you put it in there?
A. Because I remembered it, when it happened, what happened at the time.

Q. You remember better at that time than you do now?
A. Yes, sir. It has been quite awhile ago.
Q. So you do say now that there was some discussion about the $45 per month?
A. According to that there was.
Q. You wrote that in there?
A. Yes, sir.

Redirect examination.

(Mr. Donham:)

89 Q. I will ask you whether or not he made any complaint or assigned as a reason that he was quitting that his salary was not sufficient, and that he was only getting $45 per month?
A. No, sir.
Q. The reason he assigned, what was it?
A. That he was a minister and did not want to work on Sunday.
Q. So as to there being a controversy about salary, you said nothing about the controversy here in this letter about salary?
A. No, sir.

Recross-examination.

(Mr. Glover:)

Q. I will ask you if you did not state in this that he did not care to work on Sunday and that the salary of $45 per month was insufficient to support his family, you wrote that in, didn't you?
A. Yes, sir.
Q. That is all.

Witness excused.

90 Mr. Donham: Let the record show that the plaintiff admits that tender was made to him on the 19th day of August, 1918, of $31.20.
Court: That is the agreement, is it, Gentlemen?
Mr. Glover: Yes, sir; we admit that.

This was all the testimony introduced by the plaintiff in this case.
This was all the testimony introduced by the defendant in this case.
This was all the testimony introduced by either party in this case.

91 *Instructions.*

Whereupon the Court orally charged the jury as follows:
Gentlemen of the Jury: The plaintiff, Mr. H. A. F. Ault, sued the defendant for wages alleged to be due, and penalty for non-payment by the defendant. It devolves upon the plaintiff in this case to prove his contract, and to prove that he was discharged and

made his demand, and that he was refused further employment, and that he was not paid within seven days after making demand, after the expiration of the seven days thereafter. It devolves upon the plaintiff to make out his case by a fair preponderance or greater weight of the testimony. In weighing the testimony, gentlemen of the jury, you may take into consideration the demeanor of the witness upon the stand, their willingness or unwillingness to testify, if any shown, the reasonableness or unreasonableness of their testimony, the means of knowing the facts about which the witnesses testify, and the result and the interest, if any, of any witness, or that any witness may have in the result of your verdict. If the plaintiff has made out his case by a fair preponderance of the testimony, your verdict will be for the plaintiff. If he has failed to make out his case, your verdict will be for the defendant. I will read you gentlemen the written instructions that will govern you as to the law in the case.

92 To which action of the court in so charging and instructing the jury on its own motion, the defendant, at the time, excepted, and asked that its exception be noted of record, which was and is accordingly done.

Plaintiff's Instructions.

Whereupon, the plaintiff thereupon asked the court to instruct the jury, as follows:

"#1.

"The court instructs the jury that if you believe from the evidence that the plaintiff was in the employ of the defendant and that according to the terms of his employment he was receiving wages at the rate of two dollars and a half per day and that on the 28th day of July, 1918, the defendant discharged the plaintiff or refused to longer employ him at the contract price and at the time of his discharge there was due him for services rendered said company the sum of fifty ($50) dollars and the plaintiff demanded payment of same and requested the agent at Malvern under whom he was employed to pay him the money due him or have a valid check therefor sent to the said agent at Malvern within seven days and that more than seven days after he was discharged or refused longer employment he applied to said agent for his money due him

93 or a valid check therefor, but the defendant through its agents and servants failed, neglected and refused to pay the plaintiff the amount due him for work performed for the defendant and still fails to pay said wages that it will be your duty to find for the plaintiff in the sum of fifty dollars ($50.) for his actual wages due him and in addition to said amount you will find for the plaintiff in the sum of $2.50 per day from the 28th of July to this date as a penalty for the non-payment of his wages within seven days after he was discharged or refused longer employment and upon his making a demand for same more than seven days after said discharge."

By the Court: I will have to read the whole instruction again. (Reading:) "The court instructs the jury that if you believe from the evidence that the plaintiff was in the employ of the defendant and that according to the terms of his employment he was receiving wages at the rate of two dollars and a half per day and that on the 28th day of July, 1918, the defendant discharged the plaintiff or refused to longer employ him at the contract price and at the time of his discharge there was due him for services rendered said company the sum of fifty ($50) dollars and the plaintiff demanded payment of same and requested the agent at Malvern under whom he was employed to pay him the money due him or have a valid check therefor sent to the said agent at Malvern within seven days and that more than seven days after he was discharged or
94 refused longer employment he applied to said agent for his money due him or a valid check therefor, but the defendant through its agents and servants failed, neglected and refused to pay the plaintiff the amount due him for work performed for the defendant and still fails to pay said wages that it will be your duty to find for the plaintiff in the sum of fifty dollars ($50.) for his actual wages due him and in addition to said amount you will find for the plaintiff in the sum of $2.50 per day from the 28th of July to this date as a penalty for the non-payment of his wages within seven days after he was discharged or refused longer employment and upon his making a demand for same more than seven days after said discharge."

The court thereupon granted and gave said requested written instruction #1 asked by the plaintiff and so instructed and charged the jury, to which action of the court the defendant, at the time, excepted and asked that its exception be noted of record, which was and is accordingly done; and the court, of its own motion, read to the jury, plaintiff's requested written instruction #1 a second time, to which action of the Court the defendant, at the time excepted, and asked that its exceptions be noted of record, which was and is accordingly done. The reading of the above instruction the second time was rendered necessary because of correction of the phraseology. It appears in the Bill of Exceptions both times as corrected.

95 *Defendants' Instructions.*

Whereupon, the defendant asked the Court to instruct the jury as follows:

"#A."

"You are instructed that plaintiff is not entitled to recover any penalty.

The court refused to grant said instruction #A, as requested by the defendant, and refused and failed to so instruct and charge the jury, to which action of the Court, the defendant, at the time excepted and asked that its exceptions be noted of record, which was and is accordingly done.

#1.

You are instructed to find for defendant.

The Court refused to grant said instruction #1 requested by the defendant, and refused and failed to so instruct and charge the jury, to which action of the court, the defendant, at the time excepted and asked that its exceptions be noted of record, which was and is accordingly done.

"#2.

"You are instructed that if the plaintiff quit the service of the company of his own accord then he cannot recover any penalty, and would be entitled to recover only the actual wages due
96 him."

The court thereupon granted and gave said instruction #2 requested by the defendant, and so charged and instructed the jury, to which action of the court, the plaintiff, at the time, excepted, and asked that his exception be noted of record, which was and is accordingly done.

"#3.

"You are instructed that if the plaintiff quit his work because he did not want to work on Sunday, then he can recover only the actual amount of wages due him, and cannot recover a penalty."

The court thereupon granted and gave said instruction #3 requested by the defendant, and so charged and instructed the jury, to which action of the court, the plaintiff, at the time, excepted, and asked that his exception be noted of record, which was and is accordingly done.

"#4.

"You are instructed that when one is discharged, before he can recover a penalty he must have demanded of his foreman or the keeper of his time that his money or a valid check therefor be sent to a place where a regular agent is kept and even though you should believe that plaintiff was discharged, yet he cannot recover a penalty unless it has been shown by a preponderance of the evidence that he made such demand of his foreman or the keeper of his time; and unless it has been so shown even though you should be-
97 lieve that he was so discharged it would be your duty to find for the defendant as to plaintiff's claim for penalty."

The court thereupon granted and gave said instruction #4 requested by the defendant, and so charged and instructed the jury, to which action of the court, the plaintiff, at the time, excepted, and asked that his exception be noted of record, which was and is accordingly done.

After argument of counsel, the jury thereupon retired to consider of its verdict, and thereafter returned the following verdict into court, to-wit:

"We, the jury, find for the plaintiff in the sum of $50.00 as debt for labor also $2.50 per day as penalty from the 28th day of July, 1918, until the present date.

J. M. CALDWELL,
Foreman."

To which action of the jury in returning the above and foregoing verdict, the defendant, at the time, excepted, and asked that its exception be noted of record, which was and is accordingly done.

Judgment was rendered on this verdict for $50.00 debt and $390.00 penalty and costs.

Whereupon, the defendant was given — days in which to file a Motion for New Trial; and within the time allowed by the court, the defendant filed said motion for a New Trial, which is as follows:

98 *Motion for New Trial.*

(Caption Omitted.)

"Come the defendants, Missouri Pacific Railroad Company, and Walker D. Hines, Director General of Railroads, and move the court to set aside the verdict returned herein and the judgment rendered thereon and grant unto them a new trial of this cause, and for grounds of said motion, state:

"(1). That the verdict of the jury is contrary to the law.

"(2). That the verdict of the jury is contrary to the evidence.

"(3). That the verdict of the jury is contrary to the law and the evidence.

"(4). That the verdict of the jury is excessive.

"(5). That the verdict of the jury as to the penalty is unsupported by the evidence.

"(6). That the court erred in overruling defendant's objection made to the manner in which plaintiff's counsel on direct examination suggested the answers desired from the witness, H. A. F. Ault, relative to the plaintiff being discharged and refused further employment by the agents and servants of defendants, and further erred in then permitting the witness to go ahead and testify relative to the alleged facts which had been repeatedly suggested to said witness by his counsel.

"(7). That the court erred, over the objection of defendants, in permitting to be introduced in evidence by plaintiff, the purported written demand for payment of wages signed by H. A. F.
99 Ault, the plaintiff, and erred in permitting the same to be read to and considered by the jury.

"(8). That the court erred, over defendant's objection in granting and reading to the jury plaintiff's requested written instruction #1.

"(9). That the court erred in reading plaintiff's requested instruction #1 a second time to the jury.

"(10). That the court erred in refusing to grant and give defendants' requested written instruction #1.

"(11). That the court erred in refusing to grant and give defendants' requested written instruction marked "A".

"(12). That the court erred in refusing to grant and give a peremptory instruction for defendants.

"(13). That the court erred in overruling the motion of defendants to dismiss this cause as to the Missouri Pacific Railroad Company.

"(14). That the court erred in overruling defendant's motion for a peremptory instruction as to the penalty.

"Wherefore, defendants pray that the court set aside the verdict of the jury returned herein and the judgment of the court rendered thereon and that they be granted a new trial of this cause, and for all other and proper relief."

The court thereupon overruled said motion for a new trial, to which action of the court in overruling said motion, the defendant, at the time, excepted, and asked that its exception be noted of record, which was and is accordingly done.

Thereupon, the defendant prayed an appeal to the Supreme Court of Arkansas, which was granted, and defendant was given Sixty days in which to prepare its Bill of Exceptions, which, within the time allowed, was presented and signed by the Judge.

* * * * * * *

The foregoing Bill of Exceptions was, on this the 27th day of March, 1919, presented to me, was examined and found correct and signed and ordered to be filed as a part of the record in this case.

J. C. ROSS,
Judge.

O. K.

____ ____,
Attorneys for Plaintiff.

O. K.
W. R. DONHAM,
Attorney for Defendant.

Filed March 27th, 1919. R. R. Chamberlain, Clerk.

101 *Certificate of Transcript.*

STATE OF ARKANSAS,
County of Hot Springs, ss:

I, R. R. Chamberlain, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the within and foregoing pages of typewritten matter contain a true, accurate, complete and compared copy of all the pleadings, papers, files, and entries of proceedings, in the cause named in the caption, as the same now appear by comparing with the originals thereof, now on file and of record in my office of the records of Hot Springs County, Arkansas.

In testimony whereof, I hereunto set my hand as such Clerk and affix the seal of said Court, at my office, in Malvern, Arkansas, this the 22nd day of April, 1919.

[SEAL.]

R. R. CHAMBERLAIN,
Clerk of Hot Springs Circuit Court.

102 *Fee Bill.*

Clerk's fees	$14.45
Sheriff's fees	3.80
Justice of the Peace Fees	2.90
Constable Fees	.85
Witness Fees	4.50
County Tax	3.00
Judgment	440.00
Total	$469.50
Transcript	$ 28.50
	498.00

Clerk's Certificate.

STATE OF ARKANSAS,
County of Hot Springs, ss:

I, R. R. Chamberlain, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the above and foregoing fee bill is true and correct to the best of my knowledge and belief, and as the same now appears on Civil Fee Book No. 2, at page 8, of the records of Hot Springs County, Arkansas.

In witness whereof, I hereunto set my hand as such Clerk, and affix the seal of said Court, this the 22nd day of April, 1919.

[SEAL.]

R. R. CHAMBERLAIN,
Clerk of Hot Springs Circuit Court.

102½ No. 5852. Missouri Pacific Railroad Co., et al., vs. H. A. F. Ault. Hot Springs, Clk. J. C. Ross, J. $11.50. Transcript. Filed July 7, 1919. W. P. Sadler, Clerk, by J. W. Campbell, D. C.

103 STATE OF ARKANSAS,
In the Supreme Court, ss:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 26th day, being the fourth Monday of May, A. D. 1919, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 3rd day of November, 1919, a day of said term:

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES, Director General of Railroads, Appellants,

v.

H. A. F. AULT, Appellee.

Appeal from Hot Springs Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

104 May Term, 1919.

Caption Omitted.

November 17, 1919.

This cause came on to be heard upon the transcript of the record of the circuit court of Hot Springs county, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further considered that said appellee recover of said appellants all his costs in this Court in this cause expended, and have execution thereof.

105 In the Supreme Court of Arkansas, Nov. 17, 1919.

No. 216.

MO. PAC. RAILROAD COMPANY

v.

AULT.

Opinion.

HUMPHREYS, *J.*:

Appellee brought suit against the Missouri Pacific Railroad Company, before D. M. Noble, a justice of the peace in Fenter township, Hot Springs county, Arkansas, to recover the sum of $50 as wages and a penalty prescribed by Act 210 of the Acts of the Legislature of 1905, amending section 6649 of Kirby's Digest. The act, in so far as it relates to this case, is as follows: "That section 6649 of Kirby's Digest shall be amended so as to read as follows: Section 6649. Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefore, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within
106 seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid."

Default judgment was rendered in favor of appellee in the magistrate's court for $50 and $2.50 per day as a penalty for nonpayment of the wages from July 9, 1918, until the payment of said sum. An appeal was taken from that judgment to the circuit court in said county, and, on the 20th day of January, 1919, the Missouri Pacific Railroad Company filed an answer, denying the indebtedness or liability for a penalty, the discharge or refusal to continue appellee in its employment, any request or demand by appellee on his foreman or time keeper to send the amount claimed to be due him as wages, or a valid check therefor within seven days to the agent at Malvern, or that appellee applied to said agent, after seven days, for his wages, or a valid check therefor. On the 29th day of January, following, appellee filed a motion to substitute in his place, as defendant, Walker D. Hines, Director General of Railroads. Over the objection of appellant, the court refused to make the substitution, but made the Director General a party defendant. The cause then proceeded to trial

and was submitted to a jury upon the pleadings, evidence and instructions of the court. The jury returned the following verdict: "We, the jury, find for the plaintiff in the sum of $50 as debt for
107 labor; also $2.50 per day as penalty from the 28th day of July, 1918, until the present date. J. M. Caldwell, Foreman." Thereupon, a judgment was rendered against appellants for $50 debt, and $390 penalty. From that judgment, an appeal has been duly prosecuted to this court.

Appellants first insist that the undisputed evidence showed that appellee voluntarily quit the service of appellants and that it was error to render judgment against them for a statutory penalty on the theory of a discharge or refusal to further employ appellee. It is said that because the contract required appellee to work on Sunday, his failure to work in person on the Sabbath day amounted to a breach of his contract. The evidence tended to show that appellee and his employer had agreed that he might substitute, at his own expense, some one else to work on the Sabbath day. Under such an arrangement, a failure to report in person and work on the Sabbath day would not constitute a voluntary cessation of appellee's duties under the contract. It was a question for the jury to say whether or not such an arrangement was made under the contract of employment. Again, it is said that, because appellee refused to accept employment as a porter or baggage man at $45 per month, therefore, he voluntarily quit the service of said railroad company. The evidence disclosed that in the month of July, 1918, appellee was employed by W. W. Jones, station agent at Malvern, as a freight trucker at the rate of twenty-five cents an hour, or $2.50 a day
108 for a ten hour day; that after about ten days, W. W. Jones entered the army and was succeeded by E. B. Williams; that on or about the 27th day of July, appellee received information that Williams had placed him on the roll as porter, or baggageman, at a salary of $45. a month, and intended to pay him only a $1.50 per day for the entire time he had worked; that he went to see Williams, who turned to the record, under the heading "porter", and told appellee he could not allow him more than $45 a month, and that it was up to him to accept or refuse that money; that appellee contended he had not been working as porter and could not support his family on that amount; that Williams responded he could not allow more, whereupon, appellee informed him he might have the job as soon as he paid him off; that the agent sent a man to take his place, but appellee refused to let the new man go to work until he received his pay.

The appellee then consulted an old employee, who advised him that he could not keep the new man from going to work; that on the next day, Sunday, his substitute was displaced by the new man. We think the refusal of appellants to allow appellee to work longer in the capacity of freight trucker, at 25 cts. an hour, and their offer to retain him as porter or baggageman, at a salary of $45 per month, was tantamount to a discharge from and a refusal to further employ appellee in his original position, within the meaning of section 1,

Act 210 of the Acts of the Legislature of 1905. Under this
09 construction of said act, as applied to the facts in this case, it can not be said that appellee voluntarily quit the service
f appellants.

It is next insisted that appellee was not entitled to a penalty be-
use the undisputed evidence showed that he did not bring himself
ithin that provision of said act which required the employee, when
ischarged or when refused employment, to request his foreman or
eeper of his time to send the money due him, or a valid check
herefor, to a station agent, at a station where a regular agent is
ept. Appellee testified that after he made up his mind not to pre-
ent the new man from taking his place, he demanded the wages
ue him from E. B. Williams, his immediate employer, and the man
ho kept his time; that Williams responded that the money would
e here in seven days. The undisputed evidence also showed that
his conversation occurred in the Malvern depot, where appellee had
een working and where E. B. Williams was employed as the regu-
ar station agent. This court held, in the case of Biggs v. St. L. I.
M. & S. Ry. Co. 91 Ark. 122 (quoting the sixth syllabus) that:

"Where, at the time a servant was discharged by a railroad com-
pany, his foreman notified him that his money would be sent to a
station named where a regular agent was kept, to which the servant
acquiesced, this was equivalent to a request by the servant to have
the money due him sent to the station, and sufficient to entitle
110 him to recover the statutory penalty for failure to send the
money."

We think the evidence in this case brings it clearly within the rule laid down in Biggs v. St. L. I. M. & S. Ry Co. supra.

Lastly, appellant insists that it was erroneous to render any judgment against the Missouri Pacific Railroad Company, for the reason that the undisputed evidence showed that at the time of the employment and discharge of appellee the railroad was being operated by Walker D. Hines, Director General of Railroads in the United States of America, and not by said railroad company. Under authority granted by Congress on August 29, 1916, the President issued a proclamation on December 26, 1917, for the Director General to take possession of certain railroads in the United States, including the Missouri Pacific Railroad Company. On March 21, 1918, thereafter, Congress passed a statute to the effect that, "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with an order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

111 If the word "carriers" used in this act had reference to the Director General, who was operating said railroad, then it was improper to render a judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used that indicates that the word "carriers" refers to the Director General. On the contrary, the plain meaning is that so far as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the Government as before. The case of Rutherford v. Union Pacific Rd. Co. 254 Fed. 880, cited by appellant in support of its position that the statute in question had reference to the Director General, and not to the original corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of creditors. The attitude of the Director-General is that of an agent of the Government taking over the railroads as a necessity of war, under congressional and presidential authority. A receivership implies insolvency; the operation of the railroad under a Director General does not carry such an implication. We think the later case of Jensen v. Lehigh Valley Rd. 255 Fed. 795, is the better reasoned case. It was said by Judge Hand in the latter case: "It appears to me that Congress pretty clearly meant, by the term 'carriers' the corporations themselves, and that the right to sue them must
112 remain certainly till it is changed by some valid provision."

It may be contended that the statute in question is unconstitutional, because, if the claim is reduced to a judgment and enforced against the property of the corporation, it would amount to a taking of private property without due process of law from the corporation to pay a liability incurred by the act of the federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the Government. Act Mar. 21, 1918, c. 25, 40 Stat. 451. Under such a guarantee, the enforcement of judgments against the property of the railroad corporations during the control by federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgment would be the taking of private property without the process of law, or the taking of private property for public purposes without just compensation. We think the act constitutional.

No error appearing in the record, the judgment is affirmed.

113 November Term, 1919.

(Caption Omitted.)

December 1, 1919.

The appellants having within the time allowed by law filed a petition for re-hearing, and duly served the same, said petition is now submitted, with the supporting briefs, and is by the Court taken under advisement.

114 In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES, Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Petition for Rehearing.

Come the appellants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and petition the court for a rehearing herein, and for cause, state:

1. The court erred in sustaining the judgment against appellant, Missouri Pacific Railroad Company for the reason that the undisputed evidence showed that at the time of the employment and discharge of appellee, the railroad was being operated by Walker D. Hines, Director General of Railroads of the United States of America, and no- by said railroad company.

2. The court erred in sustaining the judgment for penalty against appellant, Walker D. Hines, Director General of Railroads, for the reason that General Order No. 50, promulgated by W. G. McAdoo, Director General of Railroads, directs that all suits arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad by the Director General of Railroads shall be brought against the Director General and not otherwise, pro-

115 vided however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

Wherefore, appellants respectfully pray that a rehearing be granted and that the judgment of the lower court as to appellant, Missouri Pacific Railroad Company, be reversed and dismissed, and that the judgment as to appellant, Walker D. Hines, Director General of Railroads, for penalty be reversed and dismissed.

E. B. KINSOWRTHY,
W. R. DONHAM,
Attorneys for Appellants.

I, W. R. Donham, one of the attorneys for the appellants herein, state that I have examined the opinion rendered by the court in this cause, and that I verily believe there is merit in the petition for rehearing above set out.

W. R. DONHAM.

Filed Nov. 26, 1919. W. P. Sadler, Clerk.

116 November Term, 1919.

(Caption Omitted.)

December 8, 1919.

Being fully advised, the petition filed for a rehearing in this cause, is by the Court overruled.

117 SUPREME COURT, STATE OF ARKANSAS, *ss:*

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Missouri Pacific Railroad Company and Walk*d*er D. Hines, Director General of Railroads, Appellant, vs. H. A. F. Ault, Appellee, and also the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 6th February, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

118 In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY, and WALKER D. HINES, Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Assignment of Errors.

Now come the Appellants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, and file herewith their petition for Writ of Error to the Supreme Court of the United States, and say there are errors in the record of the proceedings in the above entitled cause and for the purpose of having the same reviewed and corrected in the Supreme Court of the United States appellants make the following Assignment of Errors, to-wit:

First. The Supreme Court of Arkansas erred in affirming the action of the trial court whereby that court denied the petition of

the Missouri Pacific Railroad Company that Walker D. Hines, Director General of Railroads be substituted in the action as defendant in the place of Missouri Pacific Railroad Company, and the Missouri Pacific Railroad Company be dismissed from the action; and erred in holding that Missouri Pacific Railroad Company should not be dismissed from the action.

Second. Said Court erred in holding that under General Order No. 50 of the Director General of Railroads, it was not necessary for the Director General of Railroads to be substituted
119 as a party defendant in place of the Missouri Pacific Railroad Company and Missouri Pacific Railroad Company dismissed from the action.

Third. Said Court erred in sustaining the judgment of the trial court against Appellant, Missouri Pacific Railroad Company.

Fourth. Said Court erred in holding and deciding that judgment could be lawfully rendered against Missouri Pacific Railroad Company for a couse of action arising in a transaction of Appellee, H. A. F. Ault, with the employees and agents of the Director General of Railroads, growing out of the possession, use control and operation of the railroad of the Missouri Pacific Railroad Company by the Director General of Railroads of the United States.

Fifth. Said Court erred in holding that the operation and enforcement of judgment against Missouri Pacific Railroad Company for a cause of action arising during Federal Control of the Railroad of said Company and growing out of the possession, use, control and operation of said railroad by the Director General of Railroads for the United States, would not amount to a taking of private property without due process of law contrary to the provisions of Section 1, of Article Fourteen of the Articles in Amendment of the Constitution of the United States.

Sixth. Said Court erred in holding that Section 6649 of Kirby's Digest of the Statutes of Arkansas was valid and binding as against the Director General of Railroads for the United States, and in holding that said section 6649, authorized a judgment for penalty against the Director General of Railroads for the United States.

Seventh. The said Court erred in holding and deciding that the provisions of General Order No. 50 of the Director General of Railroads of the United States did not exempt and exclude the Director General of Railroads of the United States from any action, suit or judgment for the penalty provided by section 6649 of Kirby's Digest of the Statutes of Arkansas.

120 Eighth. Said Court erred in holding and deciding that under the Act of Congress of August 29, 1916, the President's Proclamation of December 26, 1917, the Act of Congress of March 21, 1918, providing for the possession and operation of the railroads of the United States by the United States Government, and

the lawful orders made pursuant to said statutes and Proclamations, the Director General of Railroads for the United States was not exempt and excluded from actions, suits or judgments for the penalty for non-payment of wages, provided by Section 6649 of Kirby's Digest of the Statutes of Arkansas.

Ninth. Said Court erred in holding that the evidence was sufficient to support the verdict in the action.

For which errors Appellants pray that the said judgment of the Supreme Court of Arkansas be reversed and judgment rendered in favor of Appellants, and for costs.

EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorney- for Appellants.

Filed Feb'y 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell, D. C.

121 In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY, and WALKER D. HINES, Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court of Arkansas in rendering judgment against them in the above entitled cause, the Appellants, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, hereby pray a Writ of Error from said decision and Judgment to the Supreme Court of the United States, and file herewith their assignment of errors.

EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorneys for the Appellants.

Writ of error allowed on filing of bond in sum of one thousand ($1,000.00) dollars, which shall operate as supersedeas. Jan. 31, 1920.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed Feb'y 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell, D. C.

22 In the Supreme Court of Arkansas.

ISSOURI PACIFIC RAILROAD COMPANY and WALKER D. HINES, Director General of Railroads, Appellants,

v.

H. A. F. AULT, Appellee.

Bond.

Know all men by these presents:

That we, Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, as principals, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto H. A. F. Ault, in the sum of one thousand dollars ($1,000.00), to be paid by them, to which payment well and truly to be made we bind ourselves.

Signed and sealed this 31st day of January, 1920.

Whereas, the above named appellants seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Arkansas,

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their said writ of error to effect, and shall answer all costs and damages that may be adjudged against, each for himself as to the judgment against him or it, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

MISSOURI PACIFIC RAILROAD COMPANY AND
WALKER D. HINES,
Director General of Railroads.
By R. E. WILEY.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By WYLIE B. MILLER,
Att'y in Fact.

Approved Jan. 31, 1920.
E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed Feb'y 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell, D. C.

123 In the Supreme Court of Arkansas.

MISSOURI PACIFIC RAILROAD COMPANY, and WALKER D. HINES, Director General of Railroads, Appellants,

vs.

H. A. F. AULT, Appellee.

Writ of Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Missouri Pacific Railroad Company, and Walker D. Hines, Director General of Railroads, and H. A. F. Ault, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 31 day of January, 1920.

[The seal of the District Court, Western Division, U. S. A.]

SID B. REDDING,
Clerk of the District Court of the United States, for the Western Division of the Eastern District of Arkansas.
By W. S. ALLEN,
D. C.

Filed Feby. 2, 1920. W. P. Sadler, Cl'k, by J. H. Campbell, D. C.

Allowed:
E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

124 SUPREME COURT, STATE OF ARKANSAS, *ss:*

I, W. P. Sadler, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on February —, 1920, in the matter of Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, versus H. A. F. Ault:

1. The original bond of which a copy is herein set forth.

2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this February 6th, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk, Supreme Court of Arkansas.

125 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. A. F. Ault, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arkansas, wherein the Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, are plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arkansas, January 31, 1920.

E. A. McCULLOCH,
Chief Justice, Supreme Court of Arkansas.

STATE OF ARKANSAS,
County of Hot Springs, ss:

Service of the foregoing citation is hereby acknowledged and accepted by H. A. F. Ault, appellee, by receipt of copy of same, this 3rd day of February, 1920.

D. D. GLOVER,
Attorney for Appellee.

Filed Feby. 2, 1920. W. P. Sadler, Clk, by J. H. Campbell, D. C.

126 UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, the City of Little Rock, this February 6th, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

Costs of Suit.

Costs in Circuit Court	$29.50
Costs in Supreme Court	55.00
Transcript, pursuant to Writ of Error	40.00
Paid by Plaintiff in Error.	

Endorsed on cover: File No. 27,488. Arkansas Supreme Court. Term No. 733. Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, Plaintiffs in Error, vs. H. A. F. Ault. Filed February 20th, 1920. File No. 27,488.

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS ..... *Petitioners,*

v.

H. A. F. AULT ..... *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

To the Honorable the Supreme Court of United States:

The petition of Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, respectfully shows:

A statute of the State of Arkansas provides that whenever any railroad company or re-

ceiver operating a railroad shall discharge an employee his wages shall become due at once, and if not paid in seven days then as a penalty for the nonpayment the wages shall continue at the same rate until actually paid. (See section 6649 of Kirby's Digest of Statutes of Arkansas.)

The respondent, H. A. F. Ault, was in the employ of the Director General of Railroads operating the railroad of Missouri Pacific Railroad Company, and was separated from such employment July 23, 1918. Petitioners claimed that he quit and that he was paid all wages owing to him. Respondent claimed that he was discharged and that there was a balance due him of $50. He sued the Missouri Pacific Railroad Company in a justice of the peace court of the State of Arkansas for the balance due on his wages and for the penalty at the rate of $2.50 per day. The action was removed by appeal to the circuit court where the jury decided that he had been discharged and that the $50 balance of wages was owing and returned a verdict for that and the penalty.

The suit was brought in August, 1918, and the Missouri Pacific Railroad Company was

made the sole defendant. In the circuit court the defendant filed a motion to substitute as defendant the Director General of Railroads and to dismiss the Missouri Pacific Railroad Company. This was done pursuant to the Railroad Administration's General Order No. 50, which was promulgated in October, 1918, and required all suits for actions arising during Federal control to be brought against the Director General as defendant, and in all actions already pending against the corporation for such causes of action that the Director General be substituted on motion as party defendant.

The circuit court overruled the motion to substitute and to dismiss the Missouri Pacific Railroad Company, but ordered that the Director General be made a joint defendant. The trial resulted in a verdict and judgment against both defendants for $50 wages and $390 penalty.

At the time of the motion to substitute defendants and at the trial in apt time the defendants objected to the action proceeding against the Missouri Pacific Railroad Company and to any judgment against Missouri Pacific Rail-

road Company, on the ground that there was no right to a judgment against the railroad company on a cause of action arising during Federal control.

Also due objection was made in apt time as the action proceeded to any judgment against the Director General for a penalty, on the ground that under the act of Congress and General Order No. 50, there could be no judgment against him for a penalty. The petitioners appealed to the Supreme Court of Arkansas from the judgment against them and there renewed their contention that no judgment could be properly entered against the Missouri Pacific Railroad Company for a cause of action arising during Federal control and that no judgment could be entered against the Director General for a penalty for the reasons aforesaid, and asked that the judgment against the railroad company be reversed and dismissed and that the judgment against the Director General be reversed for new trial or modified so as to eliminate the amount allowed as a penalty. The Supreme Court of Arkansas overruled both of these contentions and affirmed the judgment in an opin-

ion filed November 17, 1919. The petitioners in due time filed their motion for rehearing in the Supreme Court of Arkansas and renewed their contentions as aforesaid. The court considered their petition and overruled the same by its judgment rendered December 8, 1919.

The petitioner, Missouri Pacific Railroad Company, by moving to dismiss the action as to it in the trial court and objecting to judgment going against it on the grounds that the transaction on which the cause of action was based occurred during Government control, and the Director General had, by his General Order No. 50 provided that suits for such causes of action should be against the Director General and not against the corporations, and that the enforcement of such judgment would be a taking of its property without due process of law contrary to the Fourteenth Amendment to the Federal Constitution, claimed a right, privilege or immunity under the Constitution and a statute of the United States.

The Director General of Railroads by objecting to the judgment for any penalty against him on the ground that the act of Congress and

General Order No. 50 of the Director General provided that he should not be liable for any penalty, claimed a right, privilege or immunity under the Constitution and statute of, and a commission held and authority exercised under the Constitution of the United States.

The effect of the trial court's action in overruling petitioner's motion to substitute the Director General as defendant and to dismiss as to the railroad company and in rendering judgment against both defendants for the penalty, and of the Supreme Court's action in affirming such judgment, was to decide against a right, privilege and immunity so claimed by the Missouri Pacific Railroad Company and against a right, privilege or immunity and a commission held and an authority exercised under the Constitution of the United States by the Director General of Railroads, as aforesaid.

The decision of the Supreme Court of Arkansas was erroneous in the following particulars:

1. In deciding that judgment could be lawfully rendered against the Missouri Pacific

Railroad Company for a cause of action arising on a transaction of the respondent, H. A. F. Ault, with the agents of the Director General of Railroads growing out of the possession, use, control and operation of the railroad of Missouri Pacific Railroad Company by the Director General of Railroads of the United States.

2. In deciding that the enforcement of such judgment against Missouri Pacific Railroad Company would not amount to a taking of private property without due process of law, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. In holding that section 6649 of Kirby's Digest of the statutes of Arkansas, authorizes judgment for the penalty against the Director General of Railroads of the United States.

4. In holding that the provisions of General Order No. 50 of the Director General of Railroads of the United States did not exempt and exclude the Director General from any suit or judgment for penalty provided by section 6649 of Kirby's Digest of the statutes of Arkansas.

5. In holding that under the act of Congress of August 29, 1916, the President's proclamation of December 26, 1917, and the act of Congress of March 21, 1918, providing for the possession and operation of the railroads by the United States Government, and the lawful orders made pursuant to said statutes and proclamations, the Director General was not immune and exempt from actions, suits and judgments for the penalty for the nonpayment of wages, provided by section 6649 of Kirby's Digest of the statutes of Arkansas.

6. Petitioners furnish as Exhibit "A" to this petition a certified copy of the entire transcript of the record in the case, including the proceedings of the Supreme Court of Arkansas to which the writ of *certiorari* is asked to be directed.

Wherefore, petitioners respectfully pray that writ of *certiorari* may issue out of and under the sale of this court directed to the Supreme Court of Arkansas, to command said court to certify and send to this court on a day certain to be therein named and designated, a full and complete transcript of the record and

proceedings of the said Supreme Court in said cause therein entitled Missouri Pacific Railroad Company, and Walker D. Hines, Director General of Railroads, Appellants, v. H. A. F. Ault, Appellee, to the end that such case may be reviewed and determined by this court as provided by the act of Congress of September 6, 1916, and said judgment of the Supreme Court of Arkansas in said case may be reversed by this Honorable Court.

Respectfully submitted,

ROBERT E. WILEY,

Attorney for Petitioners.

BRIEF.

Two questions are presented on this record:

First, is a corporation which owns a railroad system liable on a claim arising on a transaction with the servants of the Director General of Railroads growing out of the possession, control and operation of such railroad by the Director General on behalf of the United States Government?

Second, is the Director General of Railroads liable for a penalty prescribed by a State statute against railroad corporations for failure to pay wages of a discharged employee when due?

These questions involve the legal operation and effect of statutes and the Constitution of the United States and therefore present Federal questions which parties with rights involved are entitled to have examined and decided by the Supreme Court of the United States when brought to that court in a proper way.

The cause has been lodged in this court upon a writ of error allowed by the Chief Jus-

lice of the Supreme Court of Arkansas. Some question appears as to whether writ of error or writ of *certiorari* is the proper method and therefore petition for *certiorari* is now also filed in order to insure that the case may be heard and decided by this court.

Section 237 of the Judicial Code as amended by Act of September 6, 1916, provides that this court may by *certiorari* cause to be certified to it for review from the highest court of a State, any cause "where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" the same.

Here the respondent, Mr. Ault, sued the railroad corporation for wages earned as a servant of the Director General operating the railroad of such railroad corporation; the transaction arose in July, 1918. In October, 1918, the Director General of Railroads issued his order No. 50 pfoviding that all suits to be brought on matters growing out of Federal control should be prosecuted against the Di-

rector General of Railroads; and that the pleadings in suits already pending against the railroad corporation on such matters, "may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom." Thereafter, and before the case was called for trial, in the circuit court the carrier corporation moved the court under that order to substitute the Director General of Railroads as defendant and dismiss the action as to the carrier company, which motion the court denied, but ordered the Director General to be made a joint defendant. To which action the defendants saved their exceptions.

At the trial the defendants requested the court to instruct the jury to find for the defendants. And also that plaintiff was not entitled to recover any penalty. The court refused these instructions and defendants saved their exceptions.

The court submitted the case to the jury to find the facts for or against the plaintiff generally without distinguishing whatever be-

tween the defendants; and on verdict being returned for the plaintiff, the court entered judgment against both defendants for $50 wages and $390 penalty.

Defendants filed their motion for new trial in the trial court on the ground, among others, that the court erred in refusing to substitute the Director General as defendant in place of the railroad company and in refusing to dismiss the action as to the railroad company, and in refusing to give a peremptory instruction to find for the defendants, and in refusing to instruct that no penalty could be recovered. The court overruled this motion and defendants saved their exceptions and appealed to the Supreme Court of Arkansas where the same contentions were made by the defendants, in addition to others which have now passed out of the case. We quote from the brief of these petitioners on original hearing in the Supreme Court of Arkansas, as follows:

"This cause of action should have been dismissed entirely as to the railroad company, for appellee alleges that he worked during July, 1918, which was after the railroads had been

taken over by the government and after an order had been made by the Director General of Railroads that suits must be instituted against him, and not against the railroad companies.

Rutherford v. Union Pac. R. Co., 254 Fed. 880.

Appellants asked the court to instruct the jury that appellee was not entitled to recover a penalty. The jury should have been so instructed, and we ask that this cause be reversed and dismissed entirely as to the railroad company and that the judgment for penalty against the Director General of Railroads be reversed and dismissed."

The act of Congress of August 29, 1916, making appropriations for the army provided that the President in time of war is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation and utilize the same to the exclusion of all other traffic thereon for the transportation of troops, etc.

The President by proclamation made on December 26, 1917, took possession and as-

sumed control of "each and every system of transportation and appurtenances thereof located wholly or in part within the boundaries of Continental United States" at 12 o'clock noon of the 28th day of December, 1918, and in the proclamation he directed that "the possession, control and utilization of such transportation systems hereby by me undertaken shall be exercised by Wm. G. McAdoo, who is hereby appointed Director General of Railroads," and also "Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

Said proclamation further provided "but suits may be brought by and against said carriers and judgments rendered as hitherto until

and except so far as said director may, by general or special orders, otherwise determine."

U. S. R. R. Administration Director General of Railroads Bulletin No. 4 (revised), p. 6.

The act of Congress approved March 21, 1918, for the operation of transportation systems while under Federal control provided in more detail methods, and rights and liabilities of the parties concerned during Federal control of the roads.

Section 8 of the act provides: "That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine."

Section 10 of that act provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the

President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress, or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control."

40 Stat. 456 C. 25, Comp. St. 1918, section 3115, 3-4.

After the passage of that act the President issued another proclamation on March 29, 1918, in which he provided that pursuant to the au-

thority vested by said act, "I do hereby authorize Wm. G. McAdoo, Director General of Railroads * * * to issue any and all orders which in any way may be found necessary or expedient in connection with the Federal control of systems of transportation, railroads and inland waterways as fully in all respects as the President is authorized to do."

> United States Railroad Administration, Director General of Railroads Bulletin No. 4 (Revised), p. 20.

On October 28, 1918, the Director General issued his order No. 50 as follows:

"Whereas, the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President;' and

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising under Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporation:

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo,

Director General of Railroads, and not otherwise. Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.
* * *

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

U. S. R. R. Administration, Director General of Railroads, Bulletin No. 4 (Revised), p. 334.

By appropriate orders and by appointment of regional directors and other subordinates, the Director General made all of the employees on railroads theretofore working for the carrier companies, employees and servants of the Director General of Railroads, and through them took and held exclusive posses-

sion and control of the physical properties and business of all of the carrier companies to the exclusion of the owners and proceeded to operate and carry on all of the business of transportation theretofore conducted by the carrier corporations including the employing, paying and discharging of servants, agents and employees.

The statute of Arkansas on which the suit for penalty is based is as follows:

"Section 6649. Whenever any railroad company or corporation or any receiver operating or constructing any railroad engaged in the business of operating or constructing any railroad or railroad bridge shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check

therefor, sent to any station where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefore shall be commenced within that time. (Act of April 21, 1903.)

In July, 1918, Mr. Ault was employed as a station baggageman at Malvern, Arkansas, by the regular agent of the Director General at that station having authority to hire and discharge employees.

This was at the station of the Missouri Pacific Railroad Company in Arkansas, and it was then under Federal control. After working 21 days he was separated from the service on account of a dispute over working on Sunday, he claiming that he was discharged, the agent claiming that he quit because he would not work on Sunday whereas the duties of his job included Sunday service.

It is the contention of your petitioners that as to the Missouri Pacific Railroad Company, the several acts of Congress, proclamations and orders issued pursuant thereto as aforesaid relieved the said railroad company from suit and judgment for the transaction with Mr. Ault. Special reliance being upon General Order No. 50 which provided that pending suits and pleadings should be amended so as to substitute the Director General of Railroads as sole defendant and dismiss the action as to the carrier corporation.

Further as to the said railroad company we contend that if it was the intention and meaning of the aforesaid statutes to provide that judgments should go against the carrier corporation for such transactions, those statutes were unconstitutional because the enforcement of the judgment would take the company's property without due process of law, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

As to the Director General, your petitioners claim that he is immune or exempt from a

suit or judgment for the penalty by the terms of the aforesaid acts of Congress, proclamations and orders; particularly the provisions of General Order No. 50 to the effect that all suits based on claims growing out of the Federal control shall be brought against the Director General, "provided however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

JUDGMENT AGAINST THE MISSOURI PACIFIC RAILROAD COMPANY FOR ANY SUM IS ERROR.

The principle of law upon which a railroad corporation is liable to judgment for the acts of the servants performing the several services which enter into transportation is that of RESPONDEAT SUPERIOR. The employer or master is responsible in law for the act, or omission, of his servant; in no other way can the employer corporation be subject to a liability. With the separation of all of the persons engaged in railroad work from the employment of the railroad corporation, the re-

sponsibility of the corporation for the acts of such persons ceased.

Mardis v. Mo. Pac. R. Co., 258 Fed. 945.

Under the doctrine of RESPONDEAT SUPERIOR the test of liability of the master is the power of control over the servant. On this point the Circuit Court of Appeals for the Eighth Circuit comments as follows, in the case of Brady v. Chicago & G. W. R. Co., 114 Fed. 100:

"If the master can not command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal can not control and direct the alleged servant, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim respondeat superior has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim respondeat superior, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer."

The opinion in the case of Mardis v. Missouri Pacific Railroad Co., *supra*, after showing that during Federal control the Director General was operating the road in exclusion of the carrier corporation, that the relation of master and servant had ceased to exist between the employees operating the railroad company and the railroad company, quotes the above language from the Brady case, and then proceeds as follows:

"The railroad, therefore, can not be held for the negligence of the employees of the Director General, unless liability is imposed by section 10 of the act of Congress of March 21, 1918 (40 Stat. 156, c. 25 [Comp. St. 1918, section 3115 3-4j]). That section provides:

" 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.'

"Is the liability sought to be fastened on the railroad company under the facts alleged in the complaint in this case inconsistent with the provisions of the acts of Congress referred to, or with the order of the President?

"In the proclamation of the President assuming control of the railroads it was provided that—

"'Suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director General may, by general or special orders, otherwise determine.' Pages 89-91, Proclamations 1917, pt. 2, Statutes U. S. 1917-1918 (Comp. St. 1918, section 1974 a, note.)

"That proclamation, as indicated by the foregoing quotation, authorized the Director General to modify or change the permission given in the proclamation to bring suits against carriers. The act of March 21, 1918, did not modify any of the provisions of the proclamation of the President. On October 28, 1918, by General Order No. 50, the Director General ordered 'that actions at law, suits in equity and proceedings in admiralty hereafter brought in

any court based on contract binding on the Director General of Railroads, claim for death or injury to persons, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad system or transportation by the Director General of Railroads, which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise.' * * *

"The order of the Director General does not contravene the acts of Congress. It is authorized by the proclamation of the President and directs a procedure that is in strict accordance with the actual facts and the rules of legal liability."

Rutherford v. Union Pacific Railroad, 254 Fed. 880, is directly on our point. There the defendant railroad corporation presented a motion to substitute the Director General in the place of the railroad corporation as defendant in the suit; the court, District Judge Munger of the District of Nebraska, granted the motion,

In the opinion the court shows that the defendant relied upon the part of General Order No. 50 of October 28, 1918, which your petitioners now rely on to the effect that pleadings in all actions based on causes growing out of the operation of the railroads by the Government may, on application be amended by substituting the Director General as defendant and dismissing the company. The plaintiff there relied upon the provisions of section 10 of the act of Congress, approved March 21, 1918, that "actions at law may be brought by and against such corporations and judgments rendered as now provided by law." Judge Munger in his opinion decided that the words "such carriers" meant "the carriers while under Federal control" as mentioned in the first part of the section; and that the carrier which was subject to suits was the agent of the President who is operating the railroads, and not the railway carriers. The opinion says:

"It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested

of authority over those acts. Moreover, the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the 'carrier' who is subject to suit is the agent of the President who is operating the railroads. The language is: 'And in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated" (p. 881).

This meaning is further borne out by the definition given in the first section of the act itself where it is said:

"Be it enacted, etc., that the President having in time of war taken over possession, use, control and operation (herein called Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized, etc."

It is here shown that the word "carriers" is intended to mean "certain railroads and systems of transportation."

In Hatcher v. A. T. & S. F. R. Co., 258 Fed. 952, it was held that where the Federal government had taken over the operation of the railroad in exclusion of the company from active management the company could not be made liable for negligence or for injury to freight shipments.

But even if it should be considered that the words "carriers while under Federal control" meant the carrier corporations themselves, still the provisions of section 10 subject them to such laws and liabilities only as are not inconsistent with the provisions of the acts of Congress and orders of the President. And as shown in the well considered opinion of District Judge Westenhaver in the case of Haubert v. B. & O. R. Co., 259 Fed. 361, a liability for acts of the servants of the Director General would be clearly inconsistent with the provision of the acts of Congress and the proclamations and orders of the President and Director General. In that case the court sustained a de-

murrer of the defendant railroad company to a complaint on a cause of action based on the wrongful death by operation of the railroad which occurred during Federal control. The opinion after showing that it is conclusively settled that complete possession and control of all railways and not a divided possession and control have been transferred to the United States by the statutes, and proclamations, and that all moneys derived from the operation of the railways are the property of the United States which together with a revolving fund appropriated by Congress are to be used to pay the expenses and liabilities of the railway lines while under Federal control, goes on to say:

"Manifestly it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under Federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. If this were done, the result would be that one person's property would be taken without his consent and without compensation to pay the debt of another.

"If the words 'common carriers' (in section 10) mean the railway companies themselves, as distinguished from the agency provided by the act for operating the railway lines, it is none the less true that they are made subject only to such liabilities as are not in inconsistent with the provisions of the act itself. It may be consistent to subject the railway companies to liabilities created by themselves or existing before being ousted from the possession and control of the property; it would be inconsistent with all the provisions of the act to subject them to liabilities for the acts and conduct of public agents operating their property under Federal control. It follows that the provisions of this section do not impose a liability upon the railway companies for acts of the Director General of Railroads and his agents, because so to do would be inconsistent with the provisions of this act.

"My conclusion is that liabilities due to operation by the agencies having possession by virtue of the acts creating and authorizing Federal control are not liabilities of the railroad companies that have been ousted from such

possession and control, that suits can not be brought against such companies and prosecuted to judgment against them, and that such claimants are limited to a right of action against the Federal control agency and to such sources of payment as are provided by the Federal Control Act."

In Nash v. Southern Pacific Railroad Co., 260 Fed. 280, the same question we have arose; plaintiff sued the railroad corporation for injury to person and property on a transaction occurring on July 8, 1918, during Federal control of the corporation's railroad system. A motion was interposed by the defendant, joined in by the Director General, that the latter be substituted as defendant and the action dismissed as to the railroad corporation. The court held that General Order No. 50 required the substitution of the Director General as defendant and that such order was within the authority conferred upon the President, and was not inconsistent with section 10 of the Act of March 21, 1918. The court's opinion, after stating the facts and quoting General Order No. 50, in full, shows that the plaintiff challenged

the validity of General Order No. 50 because it was purely legislative and because it was in conflict with section 10 of the Act of March 21, 1918, which plaintiff claimed expressly authorized the maintenance of the action against the railroad corporation.

Commenting upon this contention the court says in its opinion:

"It will readily appear, I think, that this contention of the plaintiff proceeds from a failure to apprehend fully the character and scope of the Federal Control Act, and more particularly the purpose to be subserved by section 10. In the first place, the act, as expressly declared, is an emergency measure, to meet extraordinary conditions growing out of an actual state of war, and calling for an exertion of the most extreme and drastic powers of government to meet those conditions. It is accordingly to be construed, not with that meticulous nicety which might be dictated by other circumstances, but in a broad spirit of liberality, in keeping with the purpose intended to be accomplished and having in view its emergency character.

"As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the Government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the Government. Such a taking involved in no sense the element of agency by the Government for the owners. Agency implies a consentual or contractual relation, but this was not such. It was more nearly analogous or akin to a taking by the sovereign in the right of eminent domain; and the result of such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation, and quite as necessarily an assumption of such responsibility by the Government. And this, as is clearly shown by the whole framework of the act, was what Con-

gress desired to accomplish. The conditions to be met in the emergency presented were deemed such that the administration of this vital instrumentality for successfully carrying on the war was to be freed for the time from any hazard arising through a divided control or responsibility. And as Congress could not in the nature of things foresee the many exigencies and necessities that might arise for prompt, free, and unrestrained action by the executive, in the practical administration of this great trust, the President was clothed with the broadest and most plenary powers and authority to deal with the problems as they might arise and in such manner as his judgment should dictate; and this not only as between the Government and the owners, but as between the Government and the general public, with express power to make all orders and regulations essential to carrying out the purpose of Congress.

"This being the effect of the act, and I can see room for no other construction, the provisions of General Order No. 50 were quite in harmony with a correct interpretation of such

purpose. While perhaps in a limited and technical sense the particular exertion of power embodied in the order may be said to involve the legislative function, it was not such in a sense that would render its delegation to the executive an excess of the power of Congress. It is not every such delegation of power that will be held to transgress the provisions of the Constitution defining the limitations between the legislative and executive departments of the Government; and this act, I think, for the reasons suggested, should be held to present one of the exceptions. In many instances Congress, after clearly defining the purpose to be accomplished by its enactment, has given executive officers power to make such needful and proper rules and regulations for carrying out the purpose as their judgment and the necessities should dictate, and such regulations have been uniformly held to have the force and effect of legislation. Congress has gone so far as to provide that a violation of rules and regulations so made shall constitute a criminal offense. These principles are to be found in United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Buttfield v. Stranahan,

192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Field v. Clark, 143 U. S. 649, 694, 12 Sup. Ct. 495, 36 L. Ed. 294; Arver v. United States, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; and many other cases to like effect. In Field v. Clark, it is said:

"'The Legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.'

"And in Arver v. United States (Selective Draft cases), where very extended powers were conferred upon the executive, the court, answering a similar objection say:

"'We think that the contention that the statute is void, because vesting administrative

officers with legislative discretion, has been so completely adversely settled as to require reference only to some of the decided cases. Field v. Clark, 143 U. S. 649 (12 Sup. Ct. 495, 36 L. Ed. 294); Buttfield v. Stranahan, 192 U. S. 470 (24 Sup. Ct. 349, 48 L. Ed. 525); Intermountain Rate Cases, 234 U. S. 476 (34 Sup. Ct. 986, 58 L. Ed. 1408); First National Bank v. Union Trust Co., 244 U. S. 416 (37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169).'

"The instant legislation, I think, falls clearly within the principles of these cases, and I am therefore of opinion that this order was well within the power of the Director General as the representative of the President. And certainly it was both a wise and expedient thing, and in the interest of the proper and orderly administration of justice, to direct that the defense in actions and proceedings for causes arising under Government administration and for which the latter, as we shall see, was alone answerable, should be in the name and under the direction and control of the Government's representative. Indeed, it is doubtful if any judgment binding upon the

Government could be obtained, in an action so arising, to which its representative was not made a party.

"Nor does the order in question contravene in any respect the provisions of section 10. It may readily be shown, I think, that the latter was not intended to apply to class of cases provided for in that order. This is sufficiently manifest, perhaps, from the limitations of the section itself. The owners are to remain subject to all laws and liabilities as carriers *'except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President.'* (Italics volunteered.) It would seem obviously and at once 'inconsistent' with the provisions of the act that liability should remain to the carriers for causes of action arising out of transactions with which they had nothing whatsoever to do and over which they had no control; and this language very clearly implies that Congress foresaw that such causes of action would necessarily arise under Government operation for which the owners should not and indeed could not be made to respond; and as it could not anticipate

and provide for the instances which might arise, it wisely left it to the President to regulate the manner in which such actions should be maintained.

"But over and above this consideration, the situation presented is this: What was authorized by this legislation to be taken under Federal control was specific property—that is, solely the transportation systems of the country—and that was all the proclamations of the President assumed to take into his control. The corporations owning these properties were not taken; they were left untouched and free to continue their functions as such in all respects other than in the operation of their carrier systems. Moreover, the legislation does not require the taking of every system nor all of any one system, but only to the extent deemed necessary for war purposes. This being the case, Congress was bound to know that in the business transactions of these corporations, in activities as to which they were left in control, many obligations would be created and causes of actions arise in their dealings with the public, wholly unconnected with the operation and

control of their transportation systems by the Government and with which the latter would therefore have no concern as a party; it was bound to know, moreover, and doubtless had in mind, that many thousands of actions against these corporations would be pending in the courts throughout the country and many causes of action accrued, but not yet in suit, at the time Federal control would be assumed, all arising prior to such taking and with which the Government was not concerned.

"With this situation in mind, Congress enacted the provision to be found in section 10, and it was not only a wise, but a necessary, provision for the protection of the rights of those dealing with these corporations, and to avoid what otherwise would have resulted in great confusion and uncertainty. But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could

be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress."

It has been held by this court that the control and management of the railroads by the United States is complete and exclusive of the carrier corporation owners. This was held in the case of Northern Pacific Railroad Co. v. North Dakota, 249 Fed. 533, where the court says:

"No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroad in question. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt,

the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them, which was plainly essential to the authority given was not included in it."

Other cases which hold that the carrier corporation can not be held liable for transactions with the Director General during Federal control are—

Sagona v. Pullman Co., 174 N. Y. Supp. 536.

Oyler *et al.* v. C. C. C. & St. L. R. Co. (Superior Court of Cincinnati), 17 Ohio Law Reports, 356.

If it should be considered that the provisions of section 10 of the Act of March 21, 1918, mean that the carrier corporations shall be liable to a judgment for transactions with the Director General then we contend that the enforcement of such judgment would be a taking of the carrier's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Arkansas in its opinion in this action answered this contention by saying that the act of Congress provided for the payment by the Government to the carriers of all expenses and liabilities of operations; that this would include any judgment which might be rendered against the corporation in this action. But this is not an adequate remedy. It can not be said that the substitution of a claim against the Government for the citizen's right under the Fourteenth Amendment to be immune from the taking of his property without due process of law, would satisfy the constitutional guarantee.

A claim against the Government may or may not be collected. It involves much nego-

liation and sometimes litigation and very great delay accompanied with loss of interest and other damages. The Constitution guarantees to the citizen that his property shall not be taken without due process of law, and to say that the Government can authorize the rendering and enforcement of a judgment against one citizen for the liability of another citizen on the promise that the Government will reimburse the judgment debtor and hold him harmless against damages on account of the enforcement of the judgment is not a compliance with the constitutional guarantee.

THE DIRECTOR GENERAL IS NOT LIABLE FOR ANY PENALTY.

It is within the power of the Government to take the railroads for war purposes and operate them pursuant to United States laws. Under such operation the statutes of the United States and the regulations and orders of the constituted authorities made pursuant thereto constitutes the law of the land under the provisions of the United States Constitution and supersedes all State laws covering the same field.

It is therefore lawful for Congress, or for the authority provided by Congress to operate the railroads, to make orders which supersede State regulatory provisions in the field of the operation of the railroads. Under this authority it is lawful for the Congress or the Director General to provide that penalties shall not be imposed for infringement of State regulations of the conduct of the carrier's business.

The Director General pursuant to the laws of Congress and proclamations of the President authorizing him to make general orders has made General Order No. 50 which provides for the prosecution of suits against the Director General for claims arising on transactions with the Director General during Federal control but subject to the condition and proviso that the order "shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures." This is a clear indication of the intention that the Government should not be subjected to suits for fines. No action can be maintained against the United States except by its consent and we think it is clear from this order that it has not consented to suits for fines.

It may be argued that the only remedy is not adequate or that there is no remedy at all if neither the carrier nor the Government is liable for the penalty; but as was said by Judge Westenhaver in Haubert v. B. & O. R. Co., *supra*, "if inadequate, and further remedies, both in suing and in obtaining payment, are needed to give full relief, they must be sought from that authority which confers the right to sue the United States." Such authority is Congress.

This contention on the part of the Director General of Railroads constitutes a claim of a right or immunity under a statute of the United States, and under a commission of or authority exercised under the United States.

Likewise the claim of the Missouri Pacific Railroad Company that it is exempted from a judgment for acts with reference to its property by the servants of the Director General of Railroads constitutes a claim of a right, privilege or immunity under a statute of the United States; and its claim that the enforcement of such a judgment would take its property without due process of law contrary to the Four-

teenth Amendment to the Constitution is a claim of immunity under the Constitution of the United States.

Therefore we respectfully submit that the petitioners are entitled to have a writ of *certiorari* from this court to the Supreme Court of Arkansas to bring the record here; and that upon being brought here the judgment of the lower court should be reversed and dismissed as to the Missouri Pacific Railroad Company, and the judgment for the penalty against Walker D. Hines, Director General of Railroads, should be reversed and dismissed.

Respectfully submitted,

EDGAR B. KINSWORTHY,

ROBERT E. WILEY,

Attorneys for Petitioners.

Little Rock, Arkansas, February 25, 1920.

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, *Petitioners*,

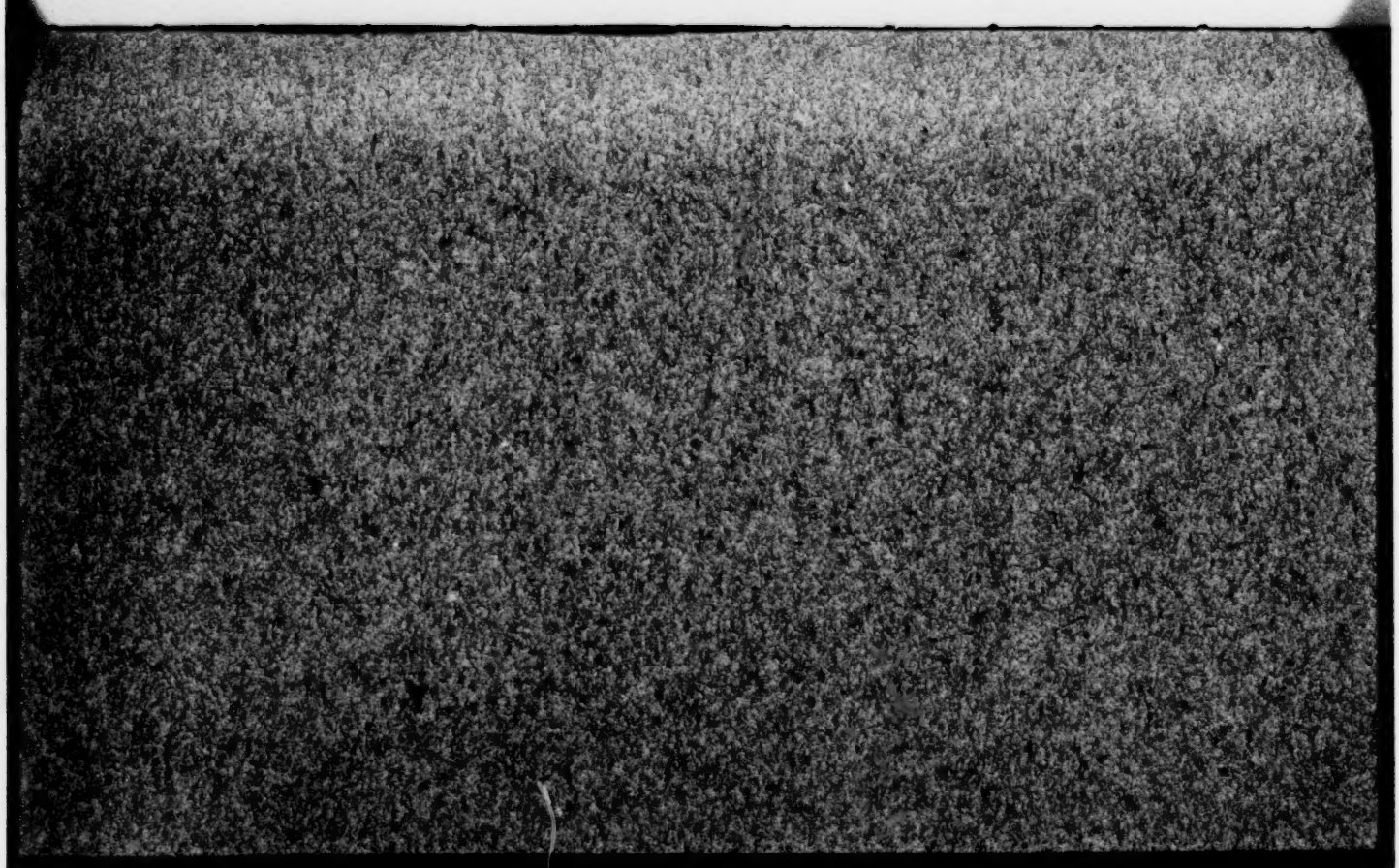
v. No. 252, October Term, 1919.

H. A. J. AULT, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

FRANK PACE, *Attorney for Respondent*.

GLOVER & SMITH, *of Counsel*.



IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS ---------- *Petitioners*

V. No. 733. Oct. Term 1919.

H. A. F. AULT----------*Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable SUPREME COURT OF UNITED STATES:

THE RESPONSE to the petition of the Mis-

souri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, respectfully shows:

A statute of the State of Arkansas provides that whenever any railroad company or receiver operating a railroad shall discharge or refuse to further employ one of its employees, that his wages shall become due and payable at once and if not paid in seven days after notice or demand, then as a penalty for the non-payment of the wages, the wages shall continue at the same rate until paid, at the contract price.

The respondent was in the employ of the Missouri Pacific Railroad Company and not in the employ of the Director General of Railroads. He was employed by W. W. Jones, Agent of the Missouri Pacific Railroad Company at twenty-five cents an hour or $2.50 per day. He was discharged and refused further employment at the contract price. He made his demand as required by the statute and after seven days repeatedly demanded his money. It was not paid him. He worked twenty-one days and it was due him $50.00. They have never to this day paid him one cent for this labor. It discharged him July 23rd, 1918. Suit was brought in August, 1918, in the Justice Court having jurisdiction. It

did not answer. It appealed to the Circuit Court and there filed answer and denied that they owed him for labor. A verdict of a jury was for the respondent. It appealed to the Supreme Court of Arkansas. It was there affirmed by the highest court of the State. In the Circuit Court, it filed its motion to make Walker D. Hines, Director General, a party defendant, which was by the court granted. It also asked that suit be dismissed as to it. Suit was brought in this case before General order No. 50 was issued and was pending in the court when it was issued. General order No. 50 was issued on the 28th day of October 1918. This is the first order directing that suits be brought against the Director General and not against the corporations, which is in Bulletin No. 4 (Revised) page 20.

The same order also provides that suits pending, for a cause of action arising since December 31st 1917, MAY, on application be amended by substituting the Director General. Not mandatory but permission given to do that, if the parties litigant and courts desired to do so.

The doctrine of RESPONDEAT SUPERIOR applied in this case at bar.

U. S. R. R. Administration, Director General of Railroads, Bulletin No. 4 (Revised) was not is-

sued until long after this cause of action arose. It was in this order, and after the appointment of regional directors and other subordinates, that the Director General made all the employees on railroads heretofore working for carrier companies, employees and servants of the Director General of Railroads. The respondent was a servant and ememployee of the Missouri Pacific Railroad on the 23rd day of July 1918.

The Director General was empowered to act by appointment from the President and to use railroads for the transportation of troops and supplies to the exclusion of other traffic and was in no sense acting as a receiver.

See Act of Congress of August 29th, 1916.

The petitioners in their brief pages 14 and 15, use this language: "The President by proclamation made on Dec. 26th, 1917, took possession and assumed control of each and every system of transportation and appurtenances thereof located wholly or in part within the boundaries of continental United States at 12 o'clock noon of the 28th day of December 1918" and appointed Wm. G. McAdoo Director General. If they are correct in that there was no Director General at the time of this cause of action. But if there was the same proclamation

of the President December 26th 1917 FUDTHER PROVIDED,, But suits may be brought by and against said carriers, and judgments rendered as heretofore until and except so far as said Director may, by general or special orders otherwise determine. Then it was proper to bring this suit as it was brought.

The Act of Congress approved March 21st 1918, provided in detail methods, the rights and liabilities of the parties concerned during Federal control of roads.

Sec. 10 of this Act provides: That carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law except in so far as may be inconsistent with the provisions of this Act, etc. It then provides that actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law. It further provides that no defense shall be made on the ground that it is an instrumentality, or agency of the Federal Government. This act further provides that suits thus brought are not transferable.

The evident purpose of this section 10 is encouched in the last expression in the section: "BUT

no process, mesne or final shall be levied against any property under such Federal control." After the passage of this act we have Bulletin No. 4 (Revised) as referred to in petitioners' brief directing that after this (which was October 28th 1918, after this cause of action at bar arose in July before) should be brought against William G. McAdoo and that other suits brought prior to this, MAY, (not SHALL), on application be amended by substituting the Director General as a party, etc.

The only question presented is "Does May mean Shall. Was it mandatory or was it directory? The Supreme Court of Arkansas did not err in its decision.

Wherefore, respondent prays, that writ of *certiorari* be not issued out of or under the seal of this court directed to the Supreme Court of Arkansas to command said court to certify and send to this court on a day to be named, a transcript and record in said cause.

Respectfully submitted,

FRANK PACE, *Attorney for Respondent*
GLOVER & SMITH, *of Counsel*

BRIEF

The petitioners seem to be at a loss to know how their contention is to be presented to this court. First they had it lodged by writ of error. Now they want a writ of *certiorari*. No Federal question was raised in the pleadings and we do not think it can be reviewed by either of the courses taken.

The respondent was in the employ of the Missouri Pacific Railroad Company, was employed by their agent, W. W. Jones, at Malvern, Arkansas, at the price of $2.50 per day. In a few days after he was employed by Jones, their agent, Mr. Jones was called into the war service and Mr. Williams took his place as agent for the Missouri Pacific Railroad Company. The respondent had worked twenty-one days, his time amounting at the time to even $50.00. Mr. Williams on the 23rd day of July 1918, discharged him and refused to further employ him at the contract price of $2.50 per day, claiming that the work or job only paid $1.50 per day, or $45.00 per month. They refused to pay him after his demand and a full compliance with the Statute of Ark-

ansas applying in such cases. In August 1918, the respondent brought suit in the Justice Court having jurisdiction of the matter. No answer was filed in that court and judgment was rendered for the respondent for his labor and the penalty provided for refusing or failing to pay within the time required by the Statute of Arkansas.

It appealed to the Circuit Court, an appellate court from the justice court. In the Circuit Court the case was tried by a jury and a verdict rendered for the respondent. It was then appealed by them to the Supreme Court of Arkansas and it was by this, the highest court of the State, affirmed in respondent's favor.

An inspection of the pleadings in this case will show that no question was raised to the jurisdiction of either of the courts in which it has been adjudicated, nor was there any Federal question raised by the pleadings that it was in any way in violation of the Constitution of the United States. The case at bar is not analogous to a case that might arise after October 28th, 1918, when the Director General issued his order No. 50. The case at bar was a cause of action that arose on the 23rd of July 1918, and suit was brought in August 1918, before this order was made. It was properly brought against

the Missouri Pacific Railroad Company at that time, because the order to require suits to be thereafter brought against William G. McAdoo was not issued for nearly three months after the suit at bar was brought.

At the time the suit was brought the respondent was a servant of the Missouri Pacific Railroad Company, and the doctrine of RESPONDEAT SUPERIOR applied.

The judgment in the suit at bar was not in conflict with amendment No. 14, Sec. 1, of the Constitution of the United States.

The United States Railroad Administration, Director General of Railroads Bulletin No. 4 (Revised) p. 20, issued on October 28th, 1918, General Order No. 50, we have this proviso: "Provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

The question now raised by petitioner as to Amendment No. 14, Sec. 1 of the Constitution of the United States was not raised even in their brief in the Supreme Court of Arkansas let alone in their pleadings, but the Supreme Court of Arkansas very ably we think, answered the contention that the petitioners now raise on that question and

we here quote the decision of the Supreme Court of Arkansas on this point:

> "Lastly, appellant insists that it was erroneous to render any judgment against the Missouri Pacific Railroad Company, for the reason that the undisputed evidence showed, that at the time of the employment and discharge of appellee, the railroad was being operated by Walker D. Hines, Director General of Railroads in the United States of America, and not by said railroad company. Under authority granted by Congress on August 1916, the President issued a proclamation on December 26th 1817, for the Director General to take possession of certain railroads in the United States, including the Missouri Pacific Railroad Company. On March 21st 1918, thereafter, Congress passed a Statute to the effect that, Carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except so far as may be inconsistent with the provisions of this Act, or any other Act applicable to such Federal control or with any order of

the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.

If the word "carriers" used in this act had reference to the Director General, who was operating said railroad, then it was improper to render judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used, that indicates that the word "carriers" refers to the Director General. On the contrary, the plain meaning is, that, so far as suing and being sued is concerned, the railroad company occupied exactly the same status, after being taken over by the Government, as before. The case of Rutherford vs. Union Pacific Rd. Co. 254 Fed. 880, cited by appellant in support of its position that the statute in question had reference to the Director General, and not to the original

corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of the creditors. The attitude of the Director General is that of an agent of the Government taking over the railroads as a necessity of war, under Congressional and Presidential authority. A receivership implies insolvency; the operation of the railroad under the director general does not carry such implication. We think the later cas of Jensen v. Lehigh Valley Rd.255 Fed. 795 is the better reasoned case. It was said by Judge Hand in the latter case: "It appears to me that Congress pretty clearly meant, by the term "carriers" the corporations themselves, and that the right to sue them must remain certainly till it is changed by some valid provision."

It may be contended that the statute in question is unconstitutional, because, if the claim is reduced to a judgment, and enforced against the property of the cor-

poration, it would amount to a taking of private property without due process of law from the corporation to pay a liability incurred by the act of the Federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the government. Act March 21st, 1918, c, 25, 40 Stat. 451. Under such a guarantee the enforcement of judgments against the property of the railroad corporations during the control by Federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgments, would be the taking of private property for public purposes without just compensation. We think the act constitutional.

No error appearing in the record, the judgment is affirmed."

The respondent worked for the Missouri Pacific Railroad Company twenty-one days and earned

at the contract price fifty dollars for his labor. He has been forced to defend his rights from the lowest court in the state of Arkansas to the Highest Court in the World, and has never to this day received one single cent for his labor.

Therefore we respectfully submit that the petitioners are not entitled to have a writ of certiorari from this court to the Supreme Court of Arkansas to bring the record here; that their petition be denied and that the decision of the Supreme Court of Arkansas be in all things approved and affirmed.

Respectfully Submitted,

FRANK PACE, *Attorney for Petitioner, Little Rock, Ark.*

D. D. GLOVER and

JABEZ M. SMITH,

of Counsel.

Malvern, Ark., March 12th, 1920.

INDEX

LIST OF CASES REFERRED TO—*Continued*

IN THE

Supreme Court of the United States

MISSOURI-PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS.....*Plaintiffs in Error,*

v. No. 252. October term, 1920.

H. A. F. AULT.....*Defendant in Error.*

IN ERROR TO SUPREME COURT OF ARKANSAS.

PLAINTIFF IN ERROR'S BRIEF ON THE WRIT OF ERROR.

This cause is here on writ of error, and also on petition for certiorari, which are to be heard together. A short brief accompanies the petition for certiorari. It is thought a further brief

on the writ of error, with more complete citation of authorities will be of assistance to the court.

STATEMENT OF CASE.

Defendant in error sued the Missouri-Pacific Railroad Company in the justice of the peace court, for wages earned as an employee while the railroad was being operated by the Government, and for penalty for their non-payment when he was discharged. There was judgment by default and the Missouri-Pacific Railroad Company appealed to the circuit court, and there moved that the Director General of Railroads be submitted for it as party defendant. This motion was overruled, but the Director General was by the court made a joint defendant (Rec., p. 5). There was a jury trial. Following was the verdict:

"We, the jury, find for the plaintiff in the sum of $50 as debt for labor; also $2.50 per day as penalty from the 28th day of July, 1918, until the present date."

On which the court entered judgment that Ault recover from both the defendants, the

Missouri-Pacific Railroad Company and Walker D. Hines, "the sum of $50 as his debt for labor performed, together with the sum of $390 as penalty" (Rec., p. 6).

The penalty was claimed and awarded under a statute of Arkansas, as follows:

"Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for the nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid. *Provided*, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time (m). Act April 21, 1903." (Section 6649, Kirby's Digest, 1904.)

The Missouri-Pacific Railroad Company, and the Director General of Railroads appealed to the Supreme Court of Arkansas, where the judgment was affirmed (Rec., p. 50). Writ of error was allowed by the Chief Justice of the Supreme Court of Arkansas (Rec., p. 58), on the assignment that the court erred in sustaining the lower court in refusing to substitute the Director General for the Railroad Company as sole defendant, and in holding that judgment could lawfully be rendered against the Missouri-Pacific Railroad Company on a cause of action growing out of the possession, use and operation of the railroad by the Government, and in holding that the enforcement of such a judgment against the railroad would not be a taking of private property without due process of law, contrary to the Fourteenth Amendment to the Constitution, and in holding that the above named statute was valid and binding as against the Director General of Railroads (Rec., pp. 56, 57).

The questions involved, therefore, are:

1. Is a carrier corporation liable to a judgment for the cause of action arising out of the

possession, use, control and operation of its railroad by the Director General of Railroads of the United States during the recent operation of railroads by the Government?

2. Is the Director General of Railroads liable to a penalty denounced by a State statute for failure to pay wages due to an employee within seven days after his discharge?

These questions are raised first by a motion of the Missouri-Pacific Railroad Company in the trial court to dismiss the cause as to Missouri-Pacific Railroad Company and substitute the Director General of Railroads as sole defendant, which motion was overruled. At page 5 of the printed record is the order of the trial court denying this motion, and exceptions by plaintiff in error. At page 7 of the printed record is the motion for a new trial giving this as a ground for new trial in the trial court which operates as an assignment of errors in the Supreme Court of Arkansas, under the Arkansas practice.

At page 53 of the printed record is the portion of the opinion of the Supreme Court of

Arkansas passing on the question, and holding that it was not erroneous to render judgment against the Missouri-Pacific Railroad Company.

At page 45 of the printed record is the defendant's request for instruction that the plaintiff was not entitled to recover any penalty, and exception saved; at page 7 of the printed record is the refusal of the trial court to give this instruction, made the ground for a new trial, and at pages 50 and 54 of the printed record is the decision of the Supreme Court of Arkansas affirming the judgment; at page 55 is defendant in error's petition for rehearing in the Supreme Court of Arkansas, further directing the court's special attention to judgment sustaining the penalty and objecting to the same, and also the court's decision overruling the petition for a rehearing is at page 56 of the printed record; this was on December 8, 1919.

At pages 56 and 57 is the plaintiff in error's assignment of errors, assignng the decision of the Supreme Court on both of these questions as error.

Writ of error allowed and issued January 31, 1920 (Rec., pp. 58, 60).

Writ of error filed in Arkansas Supreme Court February 2, 1920 (Rec., p. 61).

Citation returned served, and filed February 3, 1920 (Rec., p. 62).

Return to writ, with transcript of record filed in this court on February 20, 1920 (Rec., p. 62).

SPECIFICATION OF ERRORS.

Plaintiffs in error specifies the following errors:

1. The Supreme Court of Arkansas erred in sustaining the judgment of the trial court against the Missouri-Pacific Railroad Company, and in holding that judgment could be lawfully rendered against that company on a cause of action in a transaction of the defendant in error with the Director General of Railroads, growing out of the possession, control and operation of said railroad by the Director General of Railroads of the United States.

2. Said court erred in holding that the operation and enforcement of the judgment against the Missouri-Pacific Railroad Company

on a cause of action arising out of the possession, use, control and operation of said railroad by the Director General of Railroads for the United States, would not amount to a taking of property without due process of law, contrary to the provisions of section 1 of article 14 of the articles in amendment of the Constitution of the United States.

3. The court erred in holding that under general order No. 50 of the Director General of Railroads, it was not necessary for the Director General of Railroads to be substituted as a party defendant in place of the Missouri-Pacific Railroad Company, and the Missouri-Pacific Railroad Company to be dismissed from the action.

4. Said court erred in holding that section 6649 of Kirby's Digest of the Statutes of Arkansas was valid and binding as against the Director General of Railroads for the United States, which section authorized a judgment for a penalty against the Director General of Railroads of the United States.

ARGUMENT.

I.

JUDGMENT FOR ANY SUM CAN NOT LAWFULLY BE RENDERED AGAINST THE MISSOURI-PACIFIC RAILROAD COMPANY ON CAUSE OF ACTION ARISING OUT OF THE RECENT POSSESSION, CONTROL AND OPERATION OF ITS RAILROAD BY THE UNITED STATES GOVERNMENT.

The Arkansas Supreme Court held such a judgment lawful on the grounds that it was authorized by section 10 of the Act of Congress of March 21, 1918, which provides that:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

It construes the word "carriers" as used in that section to mean the carrier corporation, instead of the agency of the Government operating the railroad. Thus construing the word "carriers" it finds authority in the last sentence in that section for the bringing of actions at law and rendering judgments against "such carriers."

In addition to being in conflict with what the average man's idea of justice would naturally require, and therefore in conflict with what the average man would naturally expect the law to be, such a construction encounters a number of objections on the face of the statute itself, and also is in conflict with the weight of authority.

The Supreme Court of the United States in Northern Pacific Railway Company v. State of North Dakota, 250 U. S. 135, emphatically declares that the Acts of Congress and the various presidential proclamations, had entirely separated the corporations from their property, and, to quote the language of the Chief Justice, had created "complete possession by governmental authority to replace the private owner-

ship theretofore existing." The Chief Justice, in the opinion in that case, seemed specially to emphasize that phase. We quote from his opinion, found at page 903 of 63rd Law Ed. as follows:

"No elaboration could make clearer than does the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing?"

It necessarily follows that the corporation, during the period of Government operation,

was no longer a carrier, its every function as such was superseded, and as a carrier, the Federal Government, acting through its designated agency, replaced it.

It further follows that the corporation, during such period, was not under Federal control within the meaning of section 10, which, of course, must intend by the words "under control" not the ordinary supervision which the Government commonly exercises over all carrier corporations as instrumentalities of interstate commerce, but the custody, use and operation of the property provided for in the war emergency legislation.

The language then, with which section 10 begins, "Carriers while under Federal control" must mean the carrying instrumentality and the agency operating it, and not the corporation owning it. The meaning of Congress, therefore, in the provisions of section 10 must be that the agency which replaced the corporations as carriers "shall be subject to all laws and liabilities as common carriers" and that actions at law may be brought by and against the agency which replaced the corporations, but not against the corporations themselves.

This meaning is further indicated in the provision in the last clause that "In any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government." It is entirely unreasonable to construe the word "carrier" as there used as meaning the corporations, as they were, during the Government control, in no sense agencies or instrumentalities of the Federal Government. They had been separated from their property and had been superseded in the control and operation by the designated agency of the Government, towit, the Director General. If a carrier corporation were sued, it would have no occasion whatever to assert the defense that it was an instrumentality or agent of the Government.

This effect of this provision upon the question of construction of section 10 is aptly stated in the case of Rutherford v. Union Pacific, 254 Fed. 880, as follows:

"Moreover the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the 'carrier' who is subject to suit is the agent of the President operating the roads.

" 'And in any action at law or suit in equity against the carrier, no defense shall be made upon the ground that the carrier is an agency or instrumentality of the Federal Government.'

"The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the Government as to acts which occurred after their control had terminated."

It is thus seen that the construction given to section 10 by the decision of the Supreme Court of Arkansas in this case, that the words "carrier while under Federal control," "such carriers" and "against the carrier" mean the corporations, does not fit the conditions.

In the first place, the corporation deprived of the medium of transportation is no longer a carrier at all.

In the second place, the corporation, as such, was no longer "under Federal control."

"The petitioner's corporate entity and its franchises were not taken over by the Government, but only its existing physical lines of telegraph." Postal, etc., Cable Co. v. Call, 255 Fed. 850.

The activities of the railroad corporations, during Government control, were confined to the receipt of their agreed compensation from the Government, and the management of that portion of their property not connected with transportation and hence not under Federal control. They owed no duties to the Government not owed in common with other citizens and corporations. The terms "carriers under Federal control" and "such carriers" and "against such carriers" can, therefore, not apply to them.

On the other hand, those terms are directly and clearly applicable to the agency designated by the Government to operate such instrumentalities.

But if there could reasonably have been a difference of view as to the intent of Congress in the language of section 10 on this point it should no longer exist, after the enactment of the Transportation Act of 1920. It was a question of the intent of Congress in section 10 as to whether the liabilities as common carriers attached to the corporations or to the agencies operating the railroads for the Government.

towit: the Director General, and whether or not the actions at law and in equity provided in section 10 to be brought against such carriers would be against the corporations owning the railroads or against the Director General; Congress, with knowledge of some dispute as to the intent in section 10, inserted in the Transportation Act a direct and carefully prepared provision for suing the agency designated by the Government, towit: the Director General as agent, he being the agent to be appointed by the President to succeed the Director General, and further to emphasize the legislative intent that the liabilities should attach to and the suits be brought against the Gevernmental agency alone and not against the corporations, it inserted in the Transportation Act of 1920, the following provision: 206 (g) "No execution or process other than on a judgment recovered by the United States Government against the carrier shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or system of transportation by the President under Federal control."

Section 206 of the Transportation Act provides in detail for suits against the designated Federal agency on cause of action arising during the Federal operation and prohibits any execution against the property of the corporation. This is a construction by the legislative body itself, as to the meaning of its former enactments. Prior to that enactment and in the early stages of Federal control there were a few cases decided construing section 10 of the Act of March 21, 1918, as permitting judgments against corporations; but even at that early period, the weight of authorities was to the contrary. And, since the enactment of the Transportation Act of 1920, authorities are practically uniform in holding that such judgments are not permitted.

The United States Circuit Court of Appeals for the Eighth Circuit has recently passed on the question in two (2) cases:

Hines v. Dahn, decided August 2, 1920, 267 Fed. 105, was considered and decided by Circuit Judges Sanborn and Carland and District Judge Trieber, and was a well-considered opinion by Circuit Judge Carland, citing all the au-

thorities. The opinion says: "We do not think there could be any doubt about the meaning of the words "railroad" and "system of transportation" as used in the several acts of Congress and the proclamations of the President. In our judgment they refer only to the physical properties which constitute the system, or systems * * * the President had no authority nor did he pretend by the language of his proclamation, to take over the railroad corporation, or corporations, which owned the several systems, * * * Whoever has the management, control and operation of a transportation system, which is engaged as a common carrier in the transportation of passengers and freight from one place to another, is the carrier, so far as liability is concerned, for negligent operation."

The court further says:

"If it was the corporation entity, in this case the Illinois Central Ry. Co., which was to be liable for the negligence of the Director General, why did Congress provide in the Federal Control Act and the President in his proclamation, that no executions should issue on a judgment? This is a provision not found in legislation in regard to litigation, between private parties, but in litigation between private parties

and the sovereignty extending also to cities and other corporations exercising governmental functions."

In Mardis v. Hines, 267 Fed. 171, the same court, a few weeks after the Dahn case, reiterated the same conclusion, Circuit Judge Hook delivering the opinion. In that case an action was brought in the State Circuit Court of Arkansas against both the Missouri-Pacific R. R. Co. and the Director General, on a cause of action arising during the Federal control. On the ground of diversity of citizenship, the case was removed to District Court of the United States for the Western District of Arkansas, where the Missouri-Pacific demurred to the complaint, which demurrer the court sustained. From the judgment sustaining the demurrer plaintiff appealed to the United States Circuit Court of Appeals, which affirmed the judgment sustaining the demurrer, on the ground that the carrier corporation was not liable on a cause of action arising out of Government operation. This case in the district court is reported in 258 Fed. 945, and is cited in our brief which accompanies our petition for writ of certiorari, which was filed in this court prior to the decision in appeal to the court of appeals.

Other recent authorities are in line with the holding in these two cases. We refer to some of them as follows:

The Director General is a carrier since the Government took the operation of the roads, and general order 50 is authorized and valid, notwithstanding the provisions of the Act of March 21, 1917; the word "carrier" in section 10 of that act means the transportation system and not the corporation entity.

> Rutherford v. Union Pacific R. Co. (Dist. Court Nebraska) 254 Fed. 880.

Suit on a claim during Government operation is against the Government, but is authorized by the consent given in the act. The claimant can not sue a carrier corporation but his remedy is limited to a suit against the Director General.

> Haubert v. B. & O. R. Co. (Dist Court Ohio) 259 Fed. 361.

General order 50 is within the authority conferred by the act and is not inconsistent with the provisions of the act. Under that order the

Director General will be substituted and the carrier corporation dismissed from the action.

Nash v. Sou. Pac. Co. (Dist. Court California) 260 Fed. 280.

A railroad corporation can not be made liable for damage to a shipment occurring during Government operation, notwithstanding the provisions of section 10, March 21, 1918.

Hatcher & Snyder v. Atchison, T. & S. F. Ry. Co. (Dist. Court of Colorado) 258 Fed. 952.

Under the Acts of Congress, proclamations and general orders, including No. 50, a suit for personal injuries during the Government operation is authorized against the Director General notwithstanding it is in effect a suit against the Government.

Dahn v. McAdoo, Director General *et al.* (Dist. Court Iowa) 256 Fed. 549.

Upon the taking possession and control of the railroads by the Government all of the employees of the railroads who continued to work after the transfer to the Government, became employees of the Government, and service

could not be had on any of them in suits against corporations on causes of action arising prior to government control.

Southern Cotton Oil Co. v. Atlantic Coast Line R. R. Co., 257 Fed. 138.

Wade v. Seaboard Air Line Ry. Co. (Dist. Court Georgia) 257 Fed. 138.

Wood v. Clyde S. S. Co. (Dist. Court Florida) 257 Fed. 879.

The court will take judicial notice that the Government was operating the Missouri-Pacific Railroad Company in January, 1918. Judgment against a railroad company on a claim for injuries to live stock during Government operation is erroneous.

Cravens v. Hines, Dir. Genl. (Springfield Court of Appeals of Missouri) 218 S. W. 912.

To the same effect are:

Dooley v. Penn. R. R. Co., 250 Fed. 142.
U. S. v. Kambeitz, 256 Fed. 247.

Wainwright v. Penn. R. R. Co., 253 Fed. 459.

West v. Railroad, 123 N. E. Rep. 621.

II.

BEFORE THIS ACTION WAS COMMENCED THE SEPARATION OF THE CARRIER CORPORATIONS FROM THE CONTROL AND OPERATION OF THEIR RAILROAD SYSTEMS WAS COMPLETE AND THEREAFTER ONLY THE DIRECTOR GENERAL WAS SUBJECT TO SUIT AND JUDGMENT.

In our foregoing argument we have assumed that the same reasons existed at all times after the President issued his first proclamation for the taking over of the railroads for the filing of suits and obtaining of judgments against the Director General. We have argued that at all times judgments could lawfully be rendered on causes of action arising out of the operation by the Government against the agency designated by and acting for the government in the custody and operation of the railroads, and have assumed that at all times the Director General of Railroads constituted that agency.

It is possible, however, that a contention might be made that during the early part of the period of Federal control the carrier corpora-

tions themselves were availed of by the Government as in part the designated agency of the Government in the operation of the roads; that they were used by the Government as such agency of the Government to the extent, at least, of being the agency of the Government to represent the Government as defendant in actions to enforce liability arising out of Government operation.

For the reason already argued we do not think such contention sound. But, if it should be considered that the corporations did continue for a time after the Government first took charge of the railroads to act in a limited capacity as agents for the Government for the operation of the railroads, or for the purpose of being defendants in such suits, nevertheless they had wholly ceased to act as such before the institution of this action and before its trial, and the separation of the corporations from all control over the railroads was complete, and any limited agency for the Government, which it might be contended they had, had entirely ceased.

For the purpose of making this clear, we call the court's attention shortly to the history of the railroad administration, as shown in the official acts and proclamations and the general orders and circulars issued by the Director General; all of which are found in the "United States Railway Administration, Director General of Railroads Bulletin No. 4, Revised," regularly issued by the railroad administration and printed in the Government printing office. Of these documents and steps taken in the administration of the railroads, the court will take judicial notice.

On December 26, 1917, the President issued his proclamation whereby he "takes possession and assumes control" of all the railroad property, appoints Mr. McAdoo, Director General, and provides that "until and except so far as said Director General shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of business as common carriers, in the names of their respective companies."

On March 21, 1918, Congress passed the Federal Possession and Control Act, containing section 10, already cited in this brief, which provided that "carriers, while under Federal control, shall be subject to all laws and liabilities," etc. At the time this act was passed transportation of the country was being carried on under the Director General by the corporate officers "in the names of their respective companies," but that situation later ceased to exist.

Following the passage of that act, the President, on March 29, 1918, by proclamation, authorized Mr. McAdoo, as Director General, personally or through his divers agencies or persons whom he may appoint, to "issue any and all orders which may in any way be found necessary or expedient in connection with the Federal control," and generally to do all acts and things and exercise all powers and duties which by said act or any other act in relation to the subject hereof the President is authorized to do and perform.

On May 21, 1918, the Director General issued the following public announcment (see page 113 of Bulletin 4 aforesaid):

"In view of the direct responsibility for the operation of the railroads of the country placed upon Director General McAdoo by the Act of Congress and by the proclamations of the President, he has been unable to escape the conclusion that it will be advisable to place *in direct charge of each property for operating purposes a representative to be known as the Federal manager, who will report to the Regional Director* * * * While in this way the responsibility for the operation of the property will be directly to the Regional Directors and *not to the boards of directors,* it is the purpose of the Director General to accord to the boards of directors and their representatives the fullest opportunity to keep advised as to the operation and improvement of the properties and to maintain with the Director General and the Regional Directors the fullest interchange of views as to what is in the best interest of the Government and of the stockholders.

"In the development of this policy the Regional Directors and also the Federal managers will be *required to sever their official relations with the particular companies* and to

become *exclusive representatives of the United States Railroad Administration.*

"The first moves in the inauguration of this policy will be through the creation of two new regions to be known as the Allegheny Region and the Pocahontas Region."

This order placed each property in direct charge of a representative known as the Federal Manager, who would report to the Regional Director, and this manager and Regional Director were "required to sever their official relations with the corporations" and to "become exclusive representatives of the U. S. Railroad Administration." And as the first moves in this policy he created the Allegheny and Pocahontas Regions.

Afterward, on various dates, he created other regions, gradually inaugurating this policy over the entire country.

On June 6, 1918, the Director General issued circular No. 35, creating the Southwestern Region, and appointed Mr. B. F. Bush Regional Director, with offices in St. Louis, Mo. and designating the several railroad lines which should

comprise the Southwestern Region, including among many others, all the lines of the Missouri-Pacific Railroad Company and the Missouri-Pacific Railway System. (Bulletin 4 aforesaid, page 375.)

Immediately thereafter the Regional Director issued an order duly approved by the Director General appointing Mr. Alex. Robertson as Federal Manager for certain roads including all the lines of the Missouri-Pacific Railroad Company.

On July 19, 1918, the Director General issued general order No. 37, dealing with Federal treasurers. This order will give a clear idea of the completeness of corporate separation intended and effected by the Director General. It provided that "a treasurer appointed by the Federal Manager shall be known as the Federal Treasurer and are expected to devote themselves exclusively to the work of the U. S. Railroad Administration. They ought not to handle any funds for a railroad corporation or perform any other services therefor, except in special cases after obtaining express authority." The order further provides for the immediate

transfer to a Federal account of (a) all cash receipts from the operation since January 1, 1918, (b) all cash in corporation hands for use and operation of the road. And further provided, together with general order No. 37-a, an elaborate and complete system for the handling of the moneys accruing from the operation of the railroads by the U. S. Railroad Administration.

On October 28, 1918, the Director General's order No. 50, issued as follows:

General Order No. 50.

Washington, October 28, 1918.

Whereas, by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that "until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all ex-

isting statutes * * * but any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such;" and

Whereas, the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President;" and

Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on cause of action arising during or out of Federal control should be brought directly against the

said Director General of Railroads and not against said corporations;

It Is Therefore Ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court, based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; *provided, however,* that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures.

Subject to the provisions of general orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the rail-

road or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1918, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President and for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process, or otherwise in

respect of any such cause of action or proceeding.

W. G. McAdoo,

Director General of Railroads.

In view of this court's decision in the case of Northern Pacific R. R. Co. v. State of North Dakota, *supra*, that the acts of Congress and proclamations of the President had transferred complete possession and control of the properties from the corporations to the United States, no elaboration of the steps taken would be necessary. But perhaps it might be disputed as to what date prior to that decision of the court this transfer became complete; and we have taken the steps with their dates to show that prior to the institution of this action (which was on August 10, 1918—see page 2 of the printed record) and its trial on January 29, 1919, every vestige of control and possession of the railroad properties had passed out of the hands of the corporations and into those of the Government, and the Director General and his subordinates constituted the designated agency of the Government for all purposes relating to said properties and their handling.

If suit was ever authorized against a carrier corporation, that authority did not continue after the issuing of general order No. 50. And if a suit was pending against a carrier corporation at the time that order was issued, then on motion it was proper that the Director General be substituted as party defendant and the carrier corporation dismissed from the action. That is the requirement of the order. The order uses the word "may" but the whole framework of the order shows that this word is used, as it frequently is used in similar connections, in the sense of "must." The preamble to the order and the purpose to be accomplished, as gathered from the terms of the whole order, taken together, shows that it was intended that the Director General only should be subject to suit and to judgment, for causes of action arising out of the operation of the railroads by the Government. The trial court was asked by motion regularly filed to substitute the Director General instead of the Missouri-Pacific Railroad Company as party defendant, and to dismiss the action as to said Railroad Company, and it denied the motion (see page 5 of printed record) and the Supreme Court of Arkansas sustained this ruling, which, we submit, was error.

III.

THE OPERATION AND ENFORCEMENT OF A JUDGMENT AGAINST THE MISSOURI-PACIFIC RAILROAD COMPANY FOR A CAUSE OF ACTION ARISING OUT OF FEDERAL OPERATION OF ITS RAILROAD, WOULD AMOUNT TO TAKING ITS PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

We submit that to construe section 10 of the Federal Control Act of March 21, 1918, as authorizing the rendering and enforcing judgments against corporation owners of railroad property on causes of action arising out of the possession and control of such property by the Government would render the provision contrary to the Constitution of the United States, because it would take the corporations' property without due process of law, in that it would take the property of a private person to satisfy the claim of another private person against one for whose acts the first named private person is in no way responsible.

If section 10 be so construed it means that it establishes an arbitrary rule under which one person is made answerable for the defaults and negligence of another who is using a portion of his property without his consent. Such a rule is not consistent with the due process of law clause of the Federal Constitution.

In Camp v. Rogers, 44 Conn. 291, a statute attempted to make the owner secondarily liable for the negligence of any person driving his vehicle on a public street; it was sought to apply this statute in a case where the driver was not an agent or servant of the owner but a mere trespasser. The court said:

"If this be a correct construction it is so far void either as manifestly against natural justice, or as violating that article of the Constitution which prohibits the taking away of any person's property without due process of law. If such a law so construed were to be held valid then a law that should by a merely arbitrary rule make one man liable for the debts of another would be valid."

The same result is reached in Dougherty v. Thomas (Mich.), 140 N. W. 615, involving

one of the recent attempts to impose by statute an absolute liability upon the owner of an automobile for the acts of any other person driving it, whether his servant or not. The court said: "To hold the provision constitutional is to hold a party absolutely liable for the negligent conduct of another, a mere stranger or a wilful trespasser. * * * Such a doctrine seems unnatural and repugnant to the provisions of the Constitution."

In Shumacher v. Pa. Ry. Co., 175 N. Y. S. 84, the court construed section 10 of the Federal Control Act as authorizing judgments against the carrier corporations on causes arising in Federal operation, and held that so construed the provision would be unconstitutional because contrary to the Fourteenth Amendment.

The court cited the case of U. S. Administration v. Burch, 254 Fed. 140, which held that the Act of Congress did not authorize the Director General to take possession of lands belonging to the railroad company, which are not used in the business as a carrier, and that a sale of such lands under an execution would not be enjoined by the court.

In referring to the possible contention that compensation by the Government to the carrier corporations had been provided and would remove the conflict with the Constitution, the court in the Shumacher case said:

"If the carrier were compelled to pay the judgment thus sought to be entered it would undoubtedly have a just demand against the Government to be reimbursed for the money so paid; but the fact that such a demand exists in no way cures the statute of the infirmity of unconstitutionality. The taking of the property of one to pay the debts of another is none the less illegal even though the party wronged may assert his right to compensation. The condemnation is against the illegal taking and the violation of this constitutional guaranty is not cured by the possibility of future restitution."

If it be contended that the sovereign has the inherent power to take private property for public use, and that section 10 as so construed, is but an exercise of this right, the obvious answer is that the act goes further in that it provides not for the taking of a corporation's property by the government itself, but by a

third party to pay a government liability, the enforcement of a liability against a party in no way legally responsible for it. To carry the argument to its logical extent it might, with equal propriety be urged that Congress had the right to enforce actions against private individuals for the payment of Government bonds.

The United States Circuit Court of Appeals for this circuit, in Hines v. Dahn, *supra,* held that such construction would bring the provision in conflict with the Federal Constitution, saying in its opinion:

"It would be unconstitutional and contrary to the law of the land to hold that the railroad corporation, in this case, the Illinois Central Railway Co., as a corporate entity should be liable for an act done or omitted to be done in the operation of the transportation system by another party over which it had no authority or control."

IV.

THE PENALTY DENOUNCED BY THE ARKANSAS STATUTE FOR FAILURE TO PAY WAGES WHEN DUE IS NOT RECOVERABLE AGAINST THE DIRECTOR GENERAL OF RAILROADS.

Following is the verdict of the jury and the judgment of the court in this action:

"We the jury, find for the plaintiff in the sum of $50 as debt for labor; also $2.50 per day as penalty from the 28th day of July, 1918, until the present date."

"It is therefore considered, ordered and adjudged by the court that the plaintiff, H. A. F. Ault, do have and recover of and from the defendants, Missouri-Pacific Railroad Company and Walker D. Hines, Director General of Railroads, or either of them, the sum of fifty ($50) dollars, as his debt for labor performed, together with the sum of three hundred ninety ($390) dollars as penalty, and all costs accrued herein for which execution may issue." (Rec., p. 6).

The statute describes this exaction as a penalty. The language is "then as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid." It is not only a penalty, but a very severe one; if only one day's wages are due the employee and are not paid, his wages continue at the same rate, and may continue during the whole course of litigation to determine any dispute between the employer and the servant as to the amount of the wages. If a timekeeper's mistake or alleged mistake has resulted in a dispute in good faith between the carrier and the servant as to the amount due, if an employer stands on his right to test the validity of the claim by submitting to litigation, he must succeed in the litigation on the pain otherwise of paying the man wages during the whole course of the litigation, which may continue for a year or more.

The Supreme Court of Arkansas has said that for purposes of determining what court has jurisdiction this exaction may not be called a penalty, but compensation for delay in payment and punishment for failure to pay. In

other words, it is exemplary or punitive damages for failure to pay a debt.

Leep v. Railway, 58 Ark. 407.

We contend that the Government has not consented to be sued or to suffer judgment for punitive damages or penalties of this character.

The sovereign can not be sued or have judgment rendered against it without its consent. Its consent will not be presumed, but must be affirmatively shown. The defendant in error must, therefore, point out the provisions of the law which permit suit against the United States or its Director General of Railroads for this kind of an exaction.

If we look to the laws which are said to authorize the suits against the Director General, we find that Congress has enacted in the law of March 21, 1918, that "carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or common law, except in so far as may be inconsistent with the provisions of this act or any other act ap-

plicable to such Federal control, or with any order of the President."

Section 8 of the act provides that the "President may execute any powers herein and heretofore granted him with relation to the Federal control, through such agencies as he may determine." Section 9 provides that "the President, in addition to the powers conferred by this act, shall be and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

The President, by his proclamation of March 29, 1918, reappointed William G. McAdoo as Director General, and designated him as the agent of the President for the carrying out of the provisions of the above named act, and specially vested him with authority "to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads and inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all

and singular all acts and things, and to exercise all and singular powers and duties which in and by said act or any other act in relation to the subject hereof, the President is authorized to do and perform."

The Director General of Railroads thus became the agency of the Government for the carrying out of the provisions of the act. He issued general order No. 50 on October 28, 1918, which has already been copied in this brief. That order specially excepted from the right to bring suits or render judgments against the Director General of Railroads "suits or proceedings for the recovery of fines, penalties and forfeitures."

By virtue of the exception in section 10 of the Act of March 21, 1918, to the effect that the carriers under Federal control should not be subject to laws and liabilities as common carriers which were inconsistent "with any order of the President," and in this general order No. 50, which is in effect an order of the President, suits and judgments against the Director General for fines, penalties and forfeitures were prohibited and excepted from the right to sue.

That this order and other orders issued by the Director General of Railroads is within the power conferred by law, there are numerous authorities:

Nash v. Southern Pacific Ry. Co., 260 Fed. 280.

Mardis v. Hines, 258 Fed. 945.

Blevins v. Hines, 264 Fed. 1005.

Wainwright v. Penn. R. R. Co., 253 Fed 459.

Harnick v. Penn. R. R. Co., 254 Fed. 748.

On the precise point as to whether the Director General is liable to suits and judgments for fines, penalties and forfeitures, the authorities are meager. In Hines v. Taylor, 84 Sou. 381, the Supreme Court of Florida held that a statute of that State which provides double damages for kiliing stock by a railroad because of failure to fence the tracks, is not applicable to suits against the Director General for cause of action arising during Federal control. The court says: "This action being in effect against the United States by its permission, pursuant

to the Act of Congress of March 21, 1918, and the general orders issued thereunder, the penalty portion of the statute is not applicable."

In Ginn v. U. S. Railroad Administration, 103 S. E. 548, the Supreme Court of South Carolina held that the Director General can not be held liable for punitive damages.

In Owens v. Hines, 100 S. E. 617, the Supreme Court of North Carolina held "that judgment could not be rendered against the Director General for a penalty for delay in the transportation of freight," but held that judgment for such penalty could be rendered against the carrier corporation, notwithstanding the delay was during Federal control, on the ground that such statute was a police regulation which was not impaired by the Act of March 21, 1918. On March 1, 1920, this court granted a certiorari in that case. We are not advised that the case has yet been determined by this court.

Chilton v. Hines, 224 S. W. (Springfield, Mo. Court of Appeals) and Mobile & Ohio R. R. Co. v. Jobe, 84 So. (Miss.), are authorities to the effect that similar exactions may be recovered against the Director General.

This sort of an exaction is not within the "lawful police regulations" which are saved from impairment by section 15 of the Act of March 21, 1918. This penalty does not affect the health, comfort or safety of the public. It is a penalty to enforce an individual right, namely, the collection of wages, and is called by the statute which provides it a penalty; and it is apparent that it is a severe and onerous penalty.

All of the statute must be construed together; the provision of section 10 giving the President authority to make exceptions to the suits and judgments for which the Government shall be liable is as binding as the provision of section 15 saving lawful police regulations from impairment. As stated by Mr. Chief Justice White, in Van Dyke v. Cordova Copper Co., 234 U. S. 188, "We may not, in order to give effect to those words, virtually destroy the meaning of the entire context; that is, give them a significance which would be clearly repugnant to the statute looked at as a whole, and destructive of its obvious intent."

The various provisions of the act should be read, so that all may, if possible, have their due and conjoint effect without repugnance or inconsistency.

New Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656.

If we read the Act of March 21, 1918, as an entirety, we find that it is emergency legislation, temporary by its very terms, and that the President is given extensive powers and discretion to operate the railroads for the best interests of the Government. That is the outstanding feature of this act. When read together, it seems apparent that the provisions of section 10 that the President may make exceptions to the laws and liabilities which are to be enforced against the agency of the Government during Federal control, was intended as an important power, to be exercised at the discretion of the President, and the provision in section 15 that lawful police regulations are saved, is in a degree subordinated to the power given by the President. The discretion of the President should not be questioned by a narrow or nice construction of what is a lawful police regula-

tion. He has interpreted, and in his discretion has stated that a fine, penalty or forfeiture should not be recoverable against the Director General, and we submit that his authority for so declaring is clearly given by the Act of March 21, 1918, when read as a whole, with reference to the purposes to be accomplished by it.

Dated Little Rock, Arkansas, February 18, 1921.

EDGAR B. KINSWORTHY,

ROBERT E. WILEY,

Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 252.

MISSOURI-PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

H. A. F. AULT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 252.

MISSOURI-PACIFIC RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

H. A. F. AULT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

A further reason why the penalty is not recoverable against the Director General is that the statute by its terms prescribes the penalty against "any railroad company or corporation, or any receiver operating any railroad" (see statute quoted at page 3 of brief for plaintiffs in error), and the Director General is not included among these. The statute is penal and must be strictly construed.

The statute as originally enacted included natural persons operating a railroad. It read as follows:

"Whenever any railroad company or any company, corporation, or person engaged in the business of operating or constructing any railroad," etc., proceeding as per quotation of statute at page 3 of our original brief as aforesaid. The only difference in the statute as there quoted and as here being the omission there of the word "person" as above used, which is made necessary by the decision of the court that as to natural persons the act is unconstitutional, and the addition of the words "any receiver." The Supreme Court of Arkansas held the statute, so far as it covered natural persons, in conflict with the State Constitution, as well as the United States Constitution, as denying the liberty of contract (Leep *vs.* Ry., 58 Ark., 407). It sustained the act solely on the ground that as applicable to corporations it was within the reserved power in the Constitution to alter and repeal the charters of corporations (*id.*). This ground for its validity does not apply to the Director General of Railroads, and, there being no other basis for its validity, it must be held invalid because in conflict with the Constitution of the United States, section 1 of article XIV of the amendments thereto, which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

EDGAR B. KINSWORTHY,
ROBERT E. WILEY,
Attorneys for Plaintiffs in Error.

MARCH 21, 1921.

MISSOURI PACIFIC RAILROAD COMPANY ET AL. *v.* AULT.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 252. Argued March 22, 1921.—Decided June 1, 1921.

1. A railroad corporation is not liable, either at common law or under § 10 of the Federal Control Act, upon a cause of action (in this case for wages), arising out of the operation of its railroad by the Government, through the Director General of Railroads. P. 557.
2. Under § 10 of the Federal Control Act, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the owner-company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest: if it arose during government operation, the "carrier while under Federal control," meaning in this connection the transportation system as distinguished from its corporate owner, was still liable and, by legal implication, suit could be brought against the Government, or its operating agency, as the legal person responsible under the existing law for such carrier's acts. P. 561.
3. The order of the Director General of Railroads providing that suits on causes of action arising from the operation of any carrier during government control should be brought against him, and for his substitution as defendant in pending suits of that class brought against the carrier companies, was within his authority. P. 561.
4. The clause of § 10 of the Federal Control Act declaring that the carriers "shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common

law," and the provision of § 15 that the "lawful police regulations of the several States" shall continue unimpaired, do not permit an action against the Director General to recover a penalty. P. 563.

5. In an action against the Director General of Railroads, the determination whether the liability imposed by a state statute is in the nature of compensation or penalty requires the application of federal law and not state law; and the decision of the highest court of a State imposing a penalty is reviewable in this court on writ of error. P. 564.

140 Arkansas, 572, reversed; petition for writ of certiorari denied.

ERROR to review a judgment of the Supreme Court of Arkansas, affirming a judgment against the plaintiffs in error in an action to recover wages and a penalty. The facts are stated in the opinion.

Mr. Robert E. Wiley, with whom *Mr. Edgar B. Kinsworthy* was on the briefs, for plaintiffs in error.

Mr. Frank Pace, for defendant in error, submitted. *Mr. D. D. Glover* and *Mr. Jabez M. Smith* were also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

A statute of Arkansas provides that whenever a railroad company, or a receiver operating a railroad, shall discharge an employee, with or without cause, it shall pay him his full wages within seven days thereafter and that if payment is not duly made "then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid." Kirby's Digest, § 6649, as amended by Act of 1905, No. 210. Proceeding under this statute, in August, 1918, Ault brought suit before a justice of the peace against the

Missouri Pacific Railroad Company, alleging that he had been employed by the company at the rate of $2.50 per day, that he had been discharged on July 29, 1918, and that $50 was then due him as wages but had not been paid. He recovered judgment by default. The company appealed to the Circuit Court and there moved, in January, 1919, to substitute as defendant the Director General of Railroads. This substitution the court refused to make; but it joined the Director General as defendant and entered judgment against both him and the company upon a verdict that Ault recover the sum of $50 as debt and $390 as penalty. That judgment was affirmed by the Supreme Court of Arkansas. 140 Arkansas, 572.

The President had taken possession and control of the Missouri Pacific Railroad on December 28, 1917, pursuant to the Proclamation of December 26, 1917, 40 Stat. 1733, under the Act of August 29, 1916, c. 418, 39 Stat. 619, 645.[1] He was operating it through the Director General under the Federal Control Act (March 21, 1918, c. 25, 40 Stat. 451) when Ault was employed, when he was discharged and when the judgment under review was entered. See Transportation Act 1920, Act of February 28, 1920, c. 91, 41 Stat. 456. The company had claimed seasonably that under the acts of Congress it could not be held liable either for the wages or the penalty and that, if the state and federal statutes should be construed as creating such liability, they were in that respect void as to it under the Federal Constitution. The Director General did not contest liability for wages actually due,

[1] "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." (39 Stat. 645.)

but claimed that under the legislation of Congress he was not liable for the penalty and that the state statute as applied to him was void under the Federal Constitution. The claims of both defendants having been denied by the highest court of the State, they brought the case here by writ of error.

First. The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General through "one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing." *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 148. This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and the ensuing Proclamation of March 29, 1918, 40 Stat. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration." U. S. R. R. Adm., Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, § 5; 198, *et seq.;* 330, *et seq.* It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies as their interest in and control over the systems were completely suspended.

The contention that the company is liable for acts or

omissions of the Director General in operating the Missouri Pacific Railroad rests wholly upon the following provision of § 10 of the Federal Control Act: [1]

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. . . . But no process, mesne or final, shall be levied against any property under such Federal control."

It is urged that, since § 10, in terms, continues the liability of "carriers while under Federal control" and permits suit against them, it should be construed as subjecting the companies to liability for acts or omissions of the Railroad Administration although they are deprived of all power over the properties and the personnel. And it is said that this construction would not result in hardship upon the companies since the just compensation provided by the act would include any loss from judg-

---

[1] The provision in § 10 concerning suits is in substance the same as that contained in the following paragraph of the Proclamation of the President of December 26, 1917:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

ments of this sort. Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. There is none such here.

The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

This purpose Congress accomplished by providing that "carriers while under federal control" should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term "carriers" was used as it is understood in common

speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in § 1 declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such. Bull. No. 4, p. 113. Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, *id.* p. 170. Each federal treasurer was to deal with the finances of a single system; his bank account was to be designated "(Name of Railroad), Federal Account." General Order No. 37, *id.* p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, *id.* pp. 198, 200. And throughout the orders and circulars there are many such expressions as "two or more railroads or boat lines under federal control." See General Order No. 11, *id.* p. 170.[1] It is this conception of a transportation system as an entity which dominates § 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the Government's needs, the liability of the transportation

[1] By § 12 of the act receipts from the operation of each carrier are the property of the United States and, unless otherwise directed by the President, they are to be kept in the custody of the same officers and accounted for in the same way as before federal control. Disbursements are to be made from this fund without appropriation in the manner provided by the accounting regulations of the Interstate Commerce Commission. Under those regulations judgments for damages are chargeable to the operation of the railroad and are payable out of the general receipts.

system was to be enforced by allowing suit to be brought against whoever, as the party operating the same, was legally responsible under existing law, although it were the Government.

Thus, under § 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial.[1] If the cause of action arose while the Government was operating the system the "carrier while under Federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See *Gracie* v. *Palmer*, 8 Wheat. 605, 632–633. The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of explicit direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the Government liable. It doubtless seemed, as suggested in *McNulta* v. *Lochridge*, 141 U. S. 327, 331–332, that suit should be brought against the transportation company "by name 'in the hands of,' or 'in the possession of,' a receiver," or Director General. All doubt as to how suit should be brought was cleared

[1] *Muir* v. *Louisville & Nashville R. R. Co.*, 247 Fed. Rep. 888; *Wainwright* v. *Pennsylvania R. R. Co.*, 253 Fed. Rep. 459; *Di Tommaso* v. *Lehigh & New England R. R. Co.*, 28 Pa. Dist. 473; *Bolton* v. *Hines*, 143 Ark. 601; *Le Clair* v. *Montpelier & Wells River R. R. Co.*, 93 Vt. 92; *Benjamin Moore & Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 174 N. Y. S. 60; *Special Rules of Practice During Federal Control*, 50 I. C. C. 797, 798.

away by General Order No. 50, which required that it be against the Director General by name.[1]

As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the Government, the provision in Order No. 50, authorizing the substitution of the Director General as defendant in suits then pending was within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted; and the judgment against it should, therefore, be reversed.[2]

---

[1] "*It is therefore* ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures. . . .

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

[2] The great weight of authority in the federal courts is in favor of this view. See *Rutherford* v. *Union Pacific R. R. Co.*, 254 Fed. Rep. 880; *Dahn* v. *McAdoo*, 256 Fed. Rep. 549; 267 Fed. Rep. 105; *Mardis* v. *Hines*, 258 Fed. Rep. 945; 267 Fed. Rep. 171; *Hatcher & Snyder* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 258 Fed. Rep. 952; *Haubert* v. *Baltimore & Ohio R. R. Co.*, 259 Fed. Rep. 361; *Nash* v. *Southern Pacific Co.*, 260 Fed. Rep. 280; *Westbrook* v. *Director General*, 263 Fed. Rep. 211; *Blevins* v. *Hines*, 264 Fed. Rep. 1005; *Erie R. R. Co.* v. *Caldwell*,

Second. The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is rested specifically upon the clause in § 10 to the effect that the carriers "shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law," and the provision in § 15 that the "lawful police regulations of the several States" shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and federal, which prescribe how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is

---

264 Fed. Rep. 947; *Pullman Co.* v. *Sweeney*, 269 Fed. Rep. 764; *Hines* v. *Smith*, 270 Fed. Rep. 132. Contra, *Jensen* v. *Lehigh Valley R. R. Co.*, 255 Fed. Rep. 795; *Johnson* v. *McAdoo*, 257 Fed. Rep. 757; *Dampskibs* v. *Hustis*, 257 Fed. Rep. 862; *The Catawissa*, 257 Fed. Rep. 863.

The cases in the state courts show a considerable diversity of view. See *Commonwealth* v. *Louisville & Nashville R. R. Co.*, 189 Ky. 309; *McGrath* v. *Northern Pacific Ry. Co.*, 177 N. W. Rep. (N. D.) 383; *Peacock* v. *Detroit, G. H. & M. Ry. Co.*, 208 Mich. 403; *Castle* v. *Southern Ry. Co.*, 112 S. Car. 407; *Robinson* v. *Central of Georgia Ry. Co.*, 150 Ga. 41; *Galveston, H. & S. A. Ry. Co.* v. *Wurzbach*, 219 S. W. Rep. (Tex.) 252. Contra, *Mobile & Ohio R. R. Co.* v. *Jobe*, 122 Miss. 696; *Ringquist* v. *Duluth, M. & N. Ry. Co.*, 145 Minnesota, 147.

not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The Director General adopted a much more effective and direct method: "Now that the railroads are in the possession and control of the Government, it would be futile to impose fines for violations for said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishment for willful and inexcusable violations thereof upon the person or persons responsible therefor." General Order No. 8, *id.* p. 167.

The purpose for which the Government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order, "provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures." Wherever the law permitted compensatory damages they may be collected against the carrier while under federal control. Such damages may reasonably include interest and costs. See *Hines* v. *Taylor*, 79 Florida, 218. But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines* v. *Taylor*, *supra*; *Jackson-Tweed Lumber Co.* v. *Southern Ry. Co.*, 113 S. Car. 236. The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment. It is called a penalty in the state statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring: "It is allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements

and serves all the purposes of exemplary damages." *Leep* v. *Railway Co.*, 58 Arkansas, 407, 440–441. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of state, but of federal law. Whatever name be applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous.

The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied.

Judgment reversed.